UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GLASS FABRICATORS, INC. AND
GLASS AND METAL SOLUTIONS, INC.,
ALTER EGOS

and Case 08–CA–174567

INTERNATIONAL UNION OF PAINTERS
& ALLIED TRADES DISTRICT COUNCIL 6

Kyle A. Vuchak, Esq.,
Gregory M. Gleine, Esq., and
Jonathan R. King, Esq.,
for the General Counsel.
Kera Paoff, Esq.,
for the Union.
Stephen Doucette, Esq.,
for the Respondent Glass Metal Solutions, Inc.
Patricia Dotson,
for the Respondent Glass Fabricators, Inc.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Cleveland, Ohio, on August 14 and October 16–17, 2017. The International Union of Painters & Allied Trades District Council 6 (the Charging Party or Union) filed a charge on April 21, 2016,[1] and the General Counsel issued a complaint and notice of hearing in this matter on April 27, 2017.

The complaint alleges that Glass Fabricators, Inc. (GFI), as a member of the Glazing Contractors Association (the Association), agreed to recognize and be bound by the collective-bargaining agreement between the Association and the Union. The complaint also alleges that on or about July 14, 2014, Glass and Metal Solutions, Inc. (GMS) was established by

[1] A first amended charge was filed by the Charging Party on August 30, 2016, and a second amended charge was filed on April 27, 2017. All dates are 2016, unless otherwise indicated.

Respondent GFI as a disguised continuance of GFI for purposes of evading its responsibilities under the National Labor Relations Act (the Act), and that GFI and GMS, as alter egos, violated Section 8(a)(5) and (1) of the Act by: failing and refusing to recognize and bargain with the Union and repudiating the collective-bargaining agreement between the Union and GFI, including failing to apply the provisions of that agreement to the operations of GMS. The complaint additionally alleges that GFI violated 8(a)(5) and (1) of the Act by failing to provide information and unreasonably delaying in providing the Union with certain necessary and relevant information, and that GMS similarly violated the Act by failing to provide information to the Union.

The Respondents filed separate answers to the complaint, essentially denying each and every allegation. On July 17, 2017, GMS filed a motion for summary judgment with the Board and a brief in support with exhibits attached, alleging that it was not an alter ego. (GC Exh. 1(i).) On July 21, 2017, the General Counsel filed an opposition to GMS's motion for summary judgment. (GC Exh. 1(k).) Subsequently, the Board issued an Order dated August 23, 2017, denying the motion, finding that GMS failed to establish that there were no genuine issues of material fact warranting a hearing in this matter, and that it was entitled to judgment as a matter of law. *Glass Fabricators, Inc.*, 365 NLRB No. 125 (2017) (Members Pearce and McFerran; Chairman Miscimarra, dissenting).

On July 27, 2017, Patrick Thomas, counsel for GFI, withdrew from representing GFI in this proceeding. (Jt. Exh. 1.) At trial, GFI was represented by Patricia (Pat) Dotson, its owner and sole shareholder. Pat Dotson was provided the opportunity to secure other counsel, but she proceeded to the hearing unrepresented. GFI and Pat Dotson were provided the opportunity to call and examine witnesses, present evidence, and file a posthearing brief.

In this case, I find that GFI, as a member of the Glazing Contractors Association, agreed to recognize and abide by the collective-bargaining agreement between the Association and the Union. However, I find that there is insufficient evidence to establish that GMS was a disguised continuance or alter ego of GFI for purposes of evading its responsibilities under the Act, and therefore those entities did not fail to recognize and bargain with the Union or repudiate the collective-bargaining agreement as alleged. In addition, I find that GMS was not obligated to bargain with the Union or provide the Union with the information it requested, and GMS therefore did not violate the Act in that regard. However, I do find that GFI failed to provide the Union with necessary and relevant information it requested, and it also unlawfully delayed in providing some information, in violation of Section 8(a)(5) and (1) of the Act.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel, the Union, and Respondent GMS,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION

A. Respondent Glass Fabricators, Inc.

Respondent GFI admitted in its answer to the complaint that it has been an Ohio corporation with an office and place of business in Lakewood, Ohio, and that it was engaged in "installation, fabrication, and preparation of glass products and services." (GC Exh. 1(g).) The record also establishes, as alleged in the complaint, that GFI was engaged in the "removing, cutting, and setting of glass products." (GC Exh. 1(e).)

GFI denied that annually, in conducting its business operations, it purchased and received goods at its Lakewood, Ohio facility valued in excess of $50,000 directly from points located outside the State of Ohio, asserting that it was "without knowledge or information sufficient to form a belief as to the information and/or truth of the allegations contained in [that paragraph] of the complaint." (GC Exh. 1(g).) GFI also denied that it has been an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(g).)

The GFI payroll records from 2014 establish that it paid wages in excess of $95,000 to employees from January 1 through July 3, 2014 (GC Exh. 6, p. 1–10), and payroll documents produced by GFI show that from 2010 through 2013, GFI had a payroll significantly higher than its payroll in 2014. (GC Exh. 6.) In addition, an insurance declaration page dated April 5, 2013 establishes that GFI purchased insurance based on $200,000 in gross sales, maintained a $120,000 payroll, and employed six individuals. (GC Exh. 7, p. 235–236.) Patricia Dotson also testified that one of the key differences between GFI and GMS was that GFI worked

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[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent GMS's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; "U. Br." for the Union's brief; "R. Br." for Respondent GMS's brief; "GC Reply Br." for General Counsel's Reply brief; and "R. Reply Br." for Respondent GMS's Reply Brief.

In an Order dated November 20, 2017, a joint motion by the General Counsel and the Union to correct the record was granted. In that Order, the labeling of GC Exh. 58(a) in the record exhibits dated October 16, 2017, as "Identified but not offered into evidence," was corrected to reflect that GC Exh. 58(a) was offered and received into evidence.

[3] In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[4] The General Counsel, Union, and GMS filed post-hearing briefs in this matter. Thereafter, on December 20, 2017, the General Counsel filed a Motion for Leave to File Reply Brief, and attached to the motion a Reply Brief. In an Order dated December 21, 2017, I granted the General Counsel's motion, and the Union and Respondents were provided an opportunity to similarly file reply briefs or responses to the General Counsel's Reply Brief. In that connection, GMS filed a Reply Brief on January 23, 2018. All briefs filed by the parties, including the reply briefs, have been considered in this matter.

significantly larger projects, including a $100,000 project at the "Shops of Solon." (Tr. 226.) The record also establishes that GFI had only $9092 in gross receipts for the year 2015. (GC Exh. 61.)

Counsel for the General Counsel served Pat Dotson with a subpoena ad testificandum requiring her to appear and testify in this matter. (GC Exh. 59.) The General Counsel also served GFI and Pat Dotson, as its owner, with several subpoenas duces tecum requiring her appearance and the production of documents, including receipts, financial documents, and company tax returns. (GC Exh. 58.) Neither Pat Dotson nor any other representative of Respondent GFI filed a timely motion to quash or a petition to revoke the subpoenas requiring her to appear and to produce such documents. Pat Dotson also failed to appear at the opening day of the trial on August 14, 2017, and no explanation was offered for her failure to appear or for the failure to produce the requested documents. At the close of the first day of trial, the General Counsel made a motion for an indefinite postponement of the hearing and asked that the matter be held in abeyance until the subpoenas were either resolved or enforced in U.S. Federal District Court. (Tr. 132.) That motion, which was unopposed by GMS, was granted. (Tr. 128–141.) Subsequently, Counsel for the General Counsel indicated that he no longer wished to initiate court enforcement proceedings, and he requested that the hearing be reconvened. The trial resumed on October 16 and 17, 2017, with Pat Dotson appearing as representative and agent of GFI. Pat Dotson, who acknowledged that she was the president, owner, and controller of GFI testified that GFI filed federal income tax returns from 2010 through 2014. (Tr. 215–216.) Despite appearing as GFI's owner and custodian of records in this matter, and despite indicating that such documents existed and were filed, she failed to produce the subpoenaed federal income tax filings for GFI for the years 2010–2014, thereby failing comply with the subpoenas, and she did not offer an explanation for her failure to provide such documents.[5]

A party has an obligation to make a good faith effort to gather responsive documents upon service of a subpoena duce tecum, and a party that simply ignores such a subpoena does so at its own peril. In situations where parties fail to comply with duly issued subpoenas, the Board has found it appropriate to institute sanctions against the offending parties, and such determinations have been approved by the Federal Courts. See *McAllister Towing & Transportation*, 341 NLRB 394, 396–397 (2004), enfd. 156 Fed. Appx. 386, 388 (2d Cir. 2005) (the Board, with the court's affirmance, upheld the Administrative Law Judge's imposition of evidentiary sanctions against respondent for the failure to comply with duly issued subpoenas). One such sanction is drawing an adverse inference for the failure to produce subpoenaed documents. See e.g., *Essex Valley Visiting Nurses Assn*., 352 NLRB 427, 441–444 (2008), reaffd. 356 NLRB 146 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012) (failure of respondent to produce subpoenaed documents warranted an adverse inference supporting the government's allegation of single-employer status); see also *Auto Workers v. NLRB*, 459 F.2d 1329, 1338–1344 (D.C. Cir. 1972) (held that "the adverse inference rule plays a vital role in protecting the integrity of the administrative process in cases where a subpoena is ignored.")

[5] While Pat Dotson testified that she believed she turned over documents in her possession to her attorney, the tax return documents were not produced to the General Counsel for the years 2010–2014, and no explanation was provided for the failure to produce those documents. (Tr. 215–216).

Respondent GFI has denied that during all relevant times it was engaged in interstate commerce and therefore within the Board's jurisdiction. The General Counsel in this case issued subpoenas duces tecum to GFI and Pat Dotson requiring her to appear and produce records, such as the tax returns for the years 2010-2014, which were directly related to its denial that it was in commerce under the Act. GFI, however, failed to produce the requested information. The subpoenas in this case and the documents requested were clear. Pat Dotson admitted that the documents existed and were filed, but no explanation was offered for the failure to produce them. The General Counsel requests that an adverse inference be drawn that the federal tax records, if they were produced, would show that GFI was engaged in interstate commerce and it is therefore within the Board's jurisdiction. Considering the fact that such documents exist and no explanation was offered by Pat Dotson for failing to produce them, it is appropriate to draw the adverse inference requested. Such sanctions are justified in this case, and they are made in the interest of maintaining the integrity of the hearing process. See *NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970). Such sanctions have been found by the courts to allow the judge to rebalance the proceedings if a party gains an unfair advantage by its subpoena noncompliance. See also *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 34 (1st Cir. 1981) (such an inference preserves the integrity of the hearing process, and ensures that the respondent recognize that Board issued subpoenas shall not be ignored or disregarded, and it prevents the Respondent from benefiting from such actions). Accordingly, I find that if the subpoenaed tax records were produced, they would establish that GFI, in conducting its business operations, purchased and received goods at its Lakewood, Ohio facility valued in excess of $50,000 directly from points located outside the State of Ohio and that it was engaged in interstate commerce within the Board's jurisdiction.

However, I find that even in the absence of the tax records, the evidence establishes that GFI performed glass installation work for entities clearly within interstate commerce, such as Circle K and Dunkin Donuts. (Tr. 99–102.) In that regard, Anthony Augustine, the GFI Estimator who also ordered material from suppliers, testified that GFI's contracts with Circle K alone produced revenues between $6000 and $7500, and up to $18,000 per job, and for a period of approximately 3 years GFI performed approximately 15 to 22 such jobs per year. (Tr. 91, 101.) Furthermore, the testimony of Pat Dotson that GFI performed work on projects on a larger scale than GMS had worked supports finding that GFI meets the jurisdictional standards of the Board. In this connection, Pat Dotson testified that GFI performed a $100,000 project at the "Shops of Solon," as well as other projects for high-rise buildings and months-long glass replacement projects at LTV Steel, The Galleria, and Skylight Office Tower, all of which would reasonably be inferred to generate significant revenue which would require GFI to purchase and receive good and materials valued in excess of $50,000 from out of state to complete such projects. (Tr. 226–232.)

Accordingly, I find that annually, in conducting its business operations described above, GFI purchased and received goods at its Lakewood, Ohio facility valued in excess of $50,000 directly from points located outside the State of Ohio and has been engaged in commerce within the Board's jurisdiction. Accordingly, Respondent GFI is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

B. Respondent Glass and Metal Solutions, Inc.

Respondent GMS admitted in its answer to the complaint that it has been an Ohio corporation with an office and place of business in North Ridgeville, Ohio, but it denied that it was engaged in the "non-retail fabrication, removing, cutting, and setting of glass products." (GC Exh. 1(-).) Instead, in its answer to the complaint it asserts that it was "engaged in the removal and installation of glass." (GC Exh. 1).) I find that the record supports GMS's assertion that it was not involved in the fabrication and cutting of glass products, and instead that it was involved in the removal and installation of glass.

GMS also denied that annually, in conducting its business operations, it purchased and received goods at its North Ridgeville, Ohio facility valued in excess of $50,000 directly from points located outside the State of Ohio, and that it has been an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(h).)

Despite its denials, the record establishes that GMS is an Ohio corporation (GC Exh. 12), and its federal tax returns show that it had revenue in the amount of $332,755 in 2015, and Dale Dotson acknowledged that 98–99 percent of that revenue came from services rendered outside the State of Ohio. (GC 15; Tr. 371.) In addition, its 2016 tax returns showed gross revenue of $471,770 and the majority of that work was performed outside the State of Ohio. (GC Exh. 63; Tr. 373.) The record evidence thus clearly establishes that GMS, in conducting its business operations, performed services valued in excess of $50,000 in states other than the State of Ohio.[6] Accordingly, I find that Respondent GMS, at all relevant times, has been engaged in interstate commerce within the jurisdiction of the Board, and that it is an employer within the meaning of Sections 2(2), (6), and (7) of the Act.

II. PRELIMINARY ISSUES

The Respondents, besides denying the merits of the unfair labor practice allegations set forth in the complaint, also deny other relevant allegations, such as: service of the charges; the Union's labor organization status within the meaning of Section 2(5) of the Act; the bargaining

[6] While the complaint alleges that Respondent GMS is in commerce by virtue of the "direct inflow—purchase and receipt of goods and materials" standard, alternatively, the record evidence also establishes that GMS meets the commerce standard by virtue of the "direct outflow—services" standard. The General Counsel moves in its brief that the pleadings be conformed to the proof. (GC Br. 16). I find it appropriate to grant that motion to amend the pleadings. It is well established that the Board may find a violation and consider allegations not alleged in the complaint even where the General Counsel has not filed a motion to amend, if the issue is closely related to the subject matter of the complaint and has been fully and fairly litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); see also, *Williams Pipeline Co*., 315 NLRB 630 (1994). The Board has also found that where the respondent's witness testified to the facts giving rise to the unalleged violation, no party has objected to the testimony, and the respondent has had an opportunity to further explore the issue during the hearing, the "fully litigated" requirement is satisfied. Id. In this case, GMS has consistently taken the position that it is not subject to the Board's jurisdiction, and Dale Dotson provided testimony regarding commerce and jurisdiction. In addition, no party objected to such testimony and GMS was provided a full and fair opportunity to litigate the issue of commerce. Thus, GMS was afforded due process and was not prejudiced in any way by the granting of this amendment.

relationship of GFI with the Union; the supervisory and agent status of Dale Dotson, Sr. with GFI and GMS; Pat Dotson's supervisory and agent status with GFI; that the multiemployer bargaining association is an association with the purpose of representing employer-members for purposes of collective bargaining; that GFI was a member of the multiemployer bargaining association and agreed to be bound by the collective-bargaining agreement; and that GFI's employees constitute an appropriate bargaining unit.

A. The Service of the Unfair Labor Practice Charges

The charge in this case was filed by the Union on April 21, 2016, against both Respondents GFI and GMS, as a single employer and alter ego. (GC Exh. 1(a).) Sharon Zilinskas, Secretary to the Regional Attorney for the Region 8 Office of the NLRB, credibly testified that she docketed and served the charge. (Tr. 109–111.) The charge, naming both GFI and GMS, and the accompanying affidavit of service, were served on Pat Dotson at 2160 Halstead Avenue, Lakewood, Ohio (herein referred to as Halstead), which is the address for property undisputedly owned by Dale Dotson as owner of Realty Acquisitions, LLC, until June 16, 2016, and which was initially the location of Respondent GFI's business. (GC Exh. 31; Tr. 207.)

The first amended charge was filed by the Union on August 30, 2016, and it was docketed and served on August 31, 2016, by Regina Hibbitt, the case processing assistant for the NLRB's Region 8 Office. (Tr. 117–118; GC Exh. 1(c) and 1(d).) Hibbitt credibly testified that the first amended charge and accompanying affidavit of service were served on both GFI and GMS at both Halstead and 36281 Sugar Ridge Road, North Ridgeville, Ohio (herein Sugar Ridge), the subsequent location of GMS's business. Additionally, that charge was served on Patrick J. Thomas, Esq., who at the time served as counsel for both GFI and GMS. (Tr. 219, 382.) The second amended charge was filed by the Union on April 27, 2017. (GC Exh. 1(e).) Kimberly Wallace, Deputy Regional Attorney Secretary for Region 8, docketed and served that charge on Respondents on April 27, 2016. (Tr. 122-124; GC 1(f).) The second amended charge was served with the complaint and notice of hearing, on Pat Dotson at Halstead and on attorneys Patrick Thomas, Esq. and Stephen Doucette, Esq. (counsel of record for Respondent GMS in this case).

The Board has set forth in its Rules and Regulations the specific means by which timely service of an unfair labor practice charge may be perfected. Sections 102.14(a) and (b) provides that "[s]ervice may be made personally, or by registered mail, certified mail, regular mail, or private delivery service." In this case, affidavits of service by agents of the NLRB certifying that they served Respondents with copies of the charge and amended charges by regular mail establish adequate service of the charges and amended charges. (GC Exh. 1(b), 1(d), and 1(f).) That record evidence was corroborated by the credible testimony of the Board agents who executed them, and their testimony was unrebutted by the Respondents.

The Respondents argues that Dale Dotson and Pat Dotson have never been served with the charges, asserting that the charges were sent to incorrect addresses. The Respondents also argue in the alternative that they have not been served within the statutory limitations of Section 10(b) of the Act. These arguments lack merit as the evidence establishes that the original charge was mailed to the Halstead address, where GFI (and for a period of time GMS), maintained

addresses. The first amended charge was served at both the Halstead address and to former GFI counsel, Thomas. The second amended charge was served concurrently with the complaint upon both attorneys of record at that time, and the known addresses of Respondents. The Respondents' assertions regarding the alleged failure of service is belied by the fact that they both were aware of the charges as they participated in the government's investigation of those charges and independently filed timely answers to the complaint. (GC Exh. 1(g) and 1(h).) In that connection, the record establishes that on June 3, 2016, counsel at that time for both GFI and GMS responded to the Region's request for evidence in response to the charges, which had been mailed to the Respondents at the same addresses as the charges. (GC Exh. 9.) Respondents' counsel's response to the Region acknowledged receipt of the correspondence dated May 12, 2016, from the Regional Office regarding the investigation and prosecution of the charge upon which the complaint is based can also be found in documents, such as responses to the General Counsel's requests for the production of documents from both GFI and GMS. (GC Exh. 4; 22; 23; 24; 25; 26, and 66.) In addition, claims of failed service are belied by Dale Dotson's admission at trial that his attorney had shown him the charge in this matter. (Tr. 529.) In addition, the evidence does not establish that the charges were untimely filed under Sec. 10(b) of the Act.

Based on the above, I find that both GFI and GMS were properly served with the charges and amended charges.

B. The Union's Status as a Labor Organization

The complaint alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act. Both Respondents deny that allegation in their answers to the complaint.

Section 2(5) of the Act states that a labor organization is:

> . . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Michael Turkal, a business agent for the Union, testified that the Union represents employees in four crafts—glazers, painters, drywall finishers, and sign & display. (Tr. 436.) As business agent, he services the union members with regard to their terms and conditions of employment and their collective-bargaining agreement with signatory contractors. (Tr. 437–445.) Turkal testified that the Union represents employees, provides training to employees, negotiates collective-bargaining agreements on behalf of its members, supplies manpower to contractors who are signatory to those contracts, and represents employees with regard to grievances. (Tr. 440–441.) Turkal specifically testified that GFI was a signatory contractor with the Union since 2010, and the Union represented GFI's employees. (Tr. 441.)

No evidence was offered by either Respondent to rebut the fact that the Union is an organization in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, and conditions of work. In fact, despite the Respondents' denials that the Union is a labor organization, both Pat Dotson (as

owner of GFI) and Dale Dotson (as owner or GMS) provided testimony establishing that the Union is a labor organization. In that regard, Pat Dotson testified that GFI's employees were represented by the Union for purposes of collective bargaining. (Tr. 174.) She acknowledged that, as the owner of GFI, she entered into a collective-bargaining agreement with the Union and agreed to be bound by its terms. (Tr. 175–176; GC Exh. 5.) Dale Dotson also testified that when he worked for GFI, and previously with other glazing contractors, he was a member of the Union, paid union dues, and accrued union pension benefits. (Tr. 277–278.)

The undisputed evidence establishes that the Union has a constitution and bylaws which the union members agree to and are bound by, and it represents employees with regard to their terms and conditions of employment under the collective-bargaining agreement and with regard to the processing of grievances. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

C. The Association's Status as a Multiemployer Bargaining Association, and GFI's Membership in the Association and Agreement to be bound by the Collective-Bargaining Agreement

The complaint alleges that the Glazing Contractors Association of Northeast Ohio, affiliated with the Construction Employers Association (the Association) is an association composed of employers engaged in the building and construction industry and exists for the purpose, inter alia, of representing its employer members in negotiating and administering collective-bargaining agreements. (GC Exh. 1(e).) The Respondents have either denied or asserted that they had insufficient knowledge to admit or deny these allegations regarding the Association and its purpose. (GC Exh. 1(g) and 1(h).)

Union Business Agent Turkal testified that the Union represents employees in four crafts, it services the Union's members of the signatory contractors, and it makes sure the collective-bargaining agreement is being adhered to. (Tr. 436–438.) He testified that the work covered by the agreement consisted of Northeast Ohio, and that the Union provides employees with training, it negotiates collective-bargaining agreements on behalf of its members, it supplies manpower to the signatory contractors, and it represents employees concerning grievances. (Tr. 440–441.) According to Turkal, GFI was a signatory contractor with the Union since 2010, and was bound by the terms of the collective-bargaining agreement effective from 2011–2016, which automatically renews pursuant to Article XXXI, Section 1, absent notice to terminate the Agreement. (GC Exh. 5, p. 36.) That article specifically provides that:

> This Agreement will continue in full force from year to year after May 1, 2016, unless either party desires to modify or terminate the Agreement and notifies the other party in writing of its desire to do so at least sixty (60) days prior to May 1, 2016 or May 1 of any subsequent year. (GC Exh. 5, page 36)

The collective-bargaining agreement reflects the parties' desire to "stabilize employment in the Architectural Metal Glass and Glazing Industry, agree upon wage rates and conditions of employment and do away with strikes, boycotts, lockouts, and stoppages of work." (GC Exh. 5, p. 1.) Contrary to the Respondent's denials, I find that the Association is an association composed of signatory employers, with one purpose of which is to represent its employer-

members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

The complaint further alleges that on or about May 2, 2011, the Union entered into a collective-bargaining agreement with the Association, which was effective May 1, 2011, through April 30, 2016, thereby recognizing the Union as the limited exclusive collective-bargaining representative of the Unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act. In addition, the complaint alleges that since about May 1, 2011, and at all material times, GFI has been a member of the Association and thereby agreed to recognize the Union and be bound by the collective-bargaining agreement and such future agreements unless timely notice was given. (GC Exh. 1(e).)

The Respondents failed to present any evidence to contradict these allegations. In fact, Pat Dotson admitted that she signed the collective-bargaining agreement on GFI's behalf, and she also admitted that she never provided written notice to terminate the agreement. (Tr. 175–176.) Dale Dotson also admitted that GFI was signatory to the collective-bargaining agreement with the Union, that he was a member of the Union when he was employed by GFI, and that he paid dues to the Union and accrued pension benefits under the contractual union funds. (Tr. 277.) Those assertions were corroborated by the Union Pension Fund Reporting Forms, filled out by Pat Dotson for the period of time from January 2010 to February 15, 2010, showing GFI's payments to the union pension fund on behalf of its employees. (GC Exh. 62; Tr. 458–467.)

Thus, I find that since May 1, 2011, GFI has been a member of the Association and thereby agreed to recognize the Union and be bound by the terms of the collective-bargaining agreement, including any future agreement(s) because it is undisputed that timely notice was never given to terminate that relationship. I also find that pursuant to Section 8(f) of the Act, on or about May 1, 2011, the Union entered into a collective-bargaining agreement with the Association (effective May 1, 2011, through April 30, 2016), thereby recognizing the Union as the limited exclusive collective-bargaining representative of the Unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act. See, e.g. *US Reinforcing, Inc.*, 350 NLRB 404, 404 fn. 2 (2007).

D. Respondent GFI's Employees Constitute a Unit Appropriate for the Purposes of Collective-Bargaining Within the Meaning of Section 9(b) of the Act

The Respondents denied that the unit as described in the complaint is the appropriate unit for purposes of bargaining. I note, however, that the Respondents have failed to present any evidence pertaining to the appropriateness of the bargaining unit of GFI's employees. GFI was signatory to the 2011–2016 collective-bargaining agreement, as well as any subsequent agreements due to its failure to provide notice of its desire to terminate the agreement. GFI thus recognized the Union as the limited exclusive collective-bargaining agent for all employees performing glazer work within the jurisdiction of Northeast Ohio. (GC Exh. 5, Art. I.) I find the description of the unit is accurately described in the complaint, with the addition of the statutory exclusions set forth in the Act, as:

> Glazers in Ashtabula, Cuyahoga, Lorain, Lake, Geauga, eastern part of Erie County, northeastern part of Huron, northeastern part of Medina, northern part of

Summit, northern part of Portage Counties, Ohio, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

The Respondents failed to object to the admission of the collective-bargaining agreement into evidence, and they likewise failed to establish any genuine issue of material fact regarding the appropriateness of the recognized bargaining unit in the complaint. In fact, to the contrary, Pat Dotson admitted that GFI executed and abided by the terms of the collective-bargaining agreement on behalf of the employees described in the appropriate bargaining unit.

It is well established that in regard to an employer's voluntary recognition of a union, Board law provides that the Board's obligation in assessing the appropriateness of the bargaining unit under Section 9(b) is limited to ". . . a determination that the agreed-upon unit is not inconsistent with the Act or contrary to Board policy." *Alpha Associates*, 344 NLRB 782, 784 (2005); *Central Washington Hospital*, 303 NLRB 404, 412–413 (1991). Where the parties have agreed to a bargaining unit which is not contrary to the Act or Board policy, such a unit is found to be appropriate under the Act, regardless of whether the Board would have certified such a unit ab initio. *Red Coats*, 328 NLRB 205, 207 (1999); *Alpha Associates*, supra at 784. The evidence in this case establishes that GFI agreed to the unit as described in the complaint, and there has been no evidence presented which would indicate the unit is contrary to the provisions or purposes of the Act. Accordingly, I find that the unit description set forth in the complaint is an appropriate bargaining unit.

E. Patricia Dotson's and Dale Dotson's Status as Supervisors and Agents within the Meaning of Section 2(11) and 2(13) of the Act

The complaint alleges that Dale Dotson held the positions of foreman and vice president of GFI, that Pat Dotson held the position of owner of GFI, and that both have been supervisors and agents of GFI within the meaning of Sections 2(11) and 2(13) of the Act, respectively. GFI denies in its answer that both Dale and Pat Dotson held those positions with GFI and that they are supervisors and agents. (GC Exh. 1(g).) GMS admits that Dale Dotson held the position of foreman for GFI, but denies for lack of knowledge that he held the position of vice president and that he was a supervisor and agent of GFI. (GC Exh. 1(h).) GMS also admitted that Pat Dotson was a shareholder of GFI, but denied for a lack of knowledge that she was a supervisor and agent of GFI. (GC Exh. 1(h).)

The complaint also alleges that Dale Dotson held the position of owner and supervisor of GMS, and that he has been a supervisor and agent of GMS within the meaning of Section 2(11) and 2(13) of the Act, respectively. In its answer, GFI denies, as being without knowledge, that Dale Dotson held those respective positions with GMS and that he was a supervisor and agent of GMS. (GC Exh. 1(g).) GMS admitted that Dale Dotson is a "shareholder and president" of GMS, but denies that he held the position of owner and supervisor, or that he is a supervisor and agent of GMS within the meaning of the Act. (GC Exh. 1(h).)

Despite the fact that both Respondents deny the supervisor and agent status of both Dale and Pat Dotson, the record establishes that both Dotsons were supervisors and agents under the Act.

Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, provided that the authority is exercised with "independent judgment" on behalf of management and not in a routine manner. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). In order to establish that individuals are supervisors, the asserting party must show: (1) that the purported supervisor has the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their "exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment;" and (3) that their authority is exercised "in the interest of the employer." *NLRB v. Kentucky River*, supra at 710–713. It is also well established that the burden of proving supervisory status rests on the party asserting such status. *Kentucky River*, supra at 713; *Billows Electrical Supply of Northfield, Inc.*, 311 NLRB 878 (1993); *Ohio Masonic Home, Inc.*, 295 NLRB 390 (1989); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). The party seeking to prove supervisory status, in this case the General Counsel, must establish it by a preponderance of the evidence. *Republican Co.*, 361 NLRB No. 15, slip op. at 5 (2014). Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise, the evidence still nevertheless must suffice to show that such authority actually exists. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004). The Board has held that purely conclusory evidence does not establish supervisory indicia. *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 11 (2014); *Volair Contractors, Inc*., 341 NLRB 673, 675 (2004).

In this case, Pat Dotson testified that she was the President and Owner of GFI. (Tr. 166; 219.) She also held the position of "Controller" wherein she was responsible for the operation of the company, paying the bills, setting the schedules, and signing the contracts for GFI's work and products. (Tr. 168; ?56.) Pat Dotson was also responsible for making the final decisions with regard to hiring and firing employees, suspending employees, promoting and rewarding employees, resolving grievances, and assigning employees to certain jobsites. (Tr. 170–171.)

Dale Dotson held the position of foreman and supervisor for GFI, and he was the supervisor or lead foreman when he was on the jobsites for GFI. (Tr. 172; 198; 249.) He exercised independent judgment to responsibly direct employees in their work on the jobsites. (Tr. 282–283.) Former GFI employee, Anthony Augustine, who held the position of Estimator, testified that with regard to GFI, Dale Dotson was the person who contacted the Union to secure the employees to perform the work. (Tr. 54–55.) In that regard, Dale Dotson exercised independent judgment in requesting employees from the Union, utilizing his expertise in the glazing field and his assessments of what labor was necessary to perform the work. (Tr. 281–282.) Dale Dotson also testified that he exercised his own judgment and he did not have to contact Pat Dotson while on the jobsites to ask her what tasks should be assigned to certain

employees. (Tr. 281) Augustine testified that he was supervised by both Pat and Dale Dotson, and that they directed his work on a day-to-day basis. (Tr. 37; 58.) Dale Dotson denied that he held any other positions with GFI, specifically denying that he held the position of vice-president or treasurer for that company. (Tr. 263–264.) I find merit in Dale Dotson's denial that he held the position of vice-president of GFI. While the record establishes that he was a foreman for GFI, it does not establish that he held any officer positions with that company.

With regard to GMS, Dale Dotson testified that as the owner of that company he was responsible for its operation, the hiring of employees, deciding the pay rates for the employees, and deciding what work it would perform. (Tr. 245; 255.) He was also responsible for paying the bills, estimating and bidding the work, executing the contracts for work, placing the orders for supplies, and performing the installation work. (Tr. 255–256.)

Despite the Respondents' denials of supervisory status, the evidence establishes that both Pat and Dale Dotson possessed indicia of supervisory authority that were exercised in the interest of GFI. Pat Dotson had authority to hire, discharge, suspend, promote and reward employees, resolve their grievances, and assign them work. Dale Dotson assigned employees work and he had the responsibility to use his independent judgment to direct their work as the primary supervisor on the jobsites.[7] Thus, the evidence establishes that Pat and Dale Dotson were supervisors of GFI within the meaning of Section 2(11) of the Act. The evidence also establishes that Dale Dotson possessed indicia of supervisory authority for GMS in hiring employees and assigning them work. The exercise of such authority was in the interest of GMS, it was not routine, and it required use of his independent judgment. Dale Dotson was therefore also a supervisor of GMS within the meaning of Section 2(11) of the Act.

With regard to the allegations that both Pat and Dale Dotson were agents of Respondents, Section 2(13) of the Act states:

> In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board and the courts have long held that in determining whether a person acts as an agent of another, the Board applies the common-law principles of agency. *Dr. Rico Perez Products*, 353 NLRB 453, 463 (2008); *NLRB v. Longshoremen (ILWU) Local 10 (Pacific Maritime Assn.)*, 283 F.2d 558, 563 (9th Cir. 1960), enfd. as modified 123 NLRB 559 (1959). Under the common-law rules of agency, an agency relationship can be established by vesting an agent with actual or apparent authority. See *Cornell Forge Co.*, 339 NLRB 733 (2003) (an individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party). Actual authority is "created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent takes action on the principal's behalf." *Restatement (Third) Of Agency, Section 3.01* "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties

[7] The record is devoid of any evidence that the exercise of such authority was routine or clerical in nature.

when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third) of Agency, Section 2.03.* ; See *Communication Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 fn. 4 (1991) (the Board has held that under the concept of apparent authority, "an individual will be held responsible for actions of his agent when he knows of 'should know' that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.") The Board has held that the burden of proving any type of agency "rests with the party asserting that relationship." *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994); See *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); see also *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

As mentioned above, the record establishes that Pat Dotson signed contracts for GFI, and Dale Dotson ran the jobsites and supervised, along with the other foremen, the work performed for that company. In addition, Dale Dotson was responsible for all of GMS's contracts and the bidding of work that were binding on that Respondent. The record therefore establishes that Pat and Dale Dotson were vested with actual and apparent authority on GFI's behalf, and Dale Dotson was vested with actual and apparent authority on GMS's behalf. I accordingly find that Pat and Dale Dotson were agents of GFI, and that Dale Dotson was also an agent of GMS, within the meaning of Section 2(13) of the Act.

III. Alleged Unfair Labor Practices

A. The Allegations of that GMS is a Disguised Continuation of GFI and an Alter Ego, and that since July 14, 2014, both Respondents have failed and refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

1. The facts

Respondent GFI was founded by Pat Dotson in 1992 at 2160 Halstead Ave, Lakewood, Ohio. Realty Acquisitions owned the Halstead property, and she and her husband, Dale Dotson, Sr., were co-owners of Realty Acquisitions. (Tr. 92; 207; 442.)[8] GFI paid rent ($1200 to $1500 a month) but there was no written lease between Realty Acquisitions and GFI. (Tr. 310–312.) In 2011, Pat Dotson gave Dale her shares of Realty Acquisitions, and Dale Dotson became sole owner of that company and GFI's landlord. (Tr. 207; 309.)

Pat Dotson was the President and sole shareholder of GFI. (GC Exh. 2.) She worked in the office running the business. Besides being the Owner and President, Pat also held the positions of Controller and Office Manager, and she was responsible for managing the billing, payroll, and banking. (Tr. 221; 309; 535–536; 455.) Dale Dotson was a long-time glazer and journeyman union member who worked in the glass industry for many years. He did not hold an officer position with GFI, but served as foreman and was responsible for the fabrication and installation work at the jobsites. Dale testified that he reported to Pat and she supervised, evaluated, and disciplined him. (Tr. 267.) Prior to working for GFI, Dale Dotson was working for Cadillac Glass, which went out of business. (Tr. 92; 442.) The record establishes that GFI

[8] The Halstead Avenue property also had other businesses as tenants that were not related to or owned by either Pat or Dale Dotson. (Tr. 105.)

was in business from May 1992 to June 2014. Dale Dotson denied that he provided money to start GFI's business, but he cosigned and provided collateral for GFI's loans. (Tr. 206; 264–265.)

In 2009, GFI, as a member of the Association, became signatory to the collective-bargaining agreement with the Union. That contract required union security for glazer work, and provided that GFI make pension, health and welfare, and benefit contributions to the Union funds. Pat Dotson acknowledged that as owner of GFI, she entered into a contract with the Union and agreed to be bound by its terms, which included making payments to the pension and health and welfare funds. (Tr. 175–176.) In 2014, GFI stopped making payments to the Union funds, the Union pulled its members out of GFI, and GFI allegedly went out of business. The record established that GFI maintained payroll records until July 3, 2014. (GC Exh. 6.) Pat Dotson admitted that GFI never gave written notice to the Union that it was withdrawing from the collective-bargaining agreement, and it never provided notice that GFI was withdrawing from the Bargaining Association. (Tr. 176.)

Anthony Augustine was an estimator for GFI from April 2006 until it went out of business around the end of summer in 2014. Around that time, Dale Dotson started GMS at the same Halstead Avenue location. (Tr. 31–34.) After GFI closed, Augustine worked for GMS for one or two months performing estimating work. (Tr. 36.) He testified that even though he estimated some jobs for GMS, no jobs resulted from his estimation work and the company did not perform work on any jobs while he was employed there. (Tr. 37; 42.) He likewise testified that he did not travel for GMS for the short time he worked there. (Tr. 46.)

The Certificate of Incorporation for GMS, dated July 14, 2014, indicates that Dale Dotson was its sole owner and shareholder. (Tr. 250–251; GC Exh. 12.) At the time of its incorporation, GMS was located at the Halstead Avenue property which was the same property where GFI was located. (Tr. 252.) However, at some time in the fall of 2014, GMS briefly operated out of Dale Dotson's garage and was then moved to property he owned at 36821 Sugar Ridge Road in North Ridgeville, Ohio. (Tr. 172; 252; 313–316.) Pat Dotson testified that her marriage with Dale was "on the rocks" and she did not know who owned the property where GMS was located. (Tr. 174.) In 2016, Dale created Dotson Properties, LLC as the sole proprietor and manager (with no other employees), and Dotson Properties became the owner of the Sugar Ridge Road property. (Tr. 253–255.) Dale Dotson testified that when he left GFI he was out of work until sometime in 2015 because even though he started GMS in July 2014, it was not operating and it took a while for him to get any business. (Tr. 270; 316.) The evidence thus establishes that even though GMS was incorporated at the Halstead Avenue address, it did not perform any work out of that location. (Tr. 273.)

Dale Dotson testified that his last job for GFI was at the Justice Center. (Tr. 299–301.) He believed that work was sometime in February 2014, but he could not recall the date. (Tr. 299–301.) The General Counsel produced photographs of that job which showed Dale Dotson and Dale Dotson, Jr. installing glass with a lift on the second floor (up 40 feet in the air) for GFI. (Tr. 298–309; GC Exh. 28 (a)-(g).) The photographs show that they were actually taken on July 22, 2014, approximately 5 months after Dale Dotson believed they were taken. (Tr. 467–468, 487; GC Exh. 28 and 70.) Dale Dotson testified that Mike Turkal approached him at that job and told him that the Union was going to have to suspend him. (Tr. 305.)

Toward the end of Dale Dotson's tenure with GFI, he worked without pay. (306) Specifically, when he was working on his last job at the Justice Center he worked without pay to help his wife who was struggling financially. Thus, even though Dale Dotson incorporated GMS on July 14, 2014, it was not yet operational. Shortly after that, on July 22, 2014, he performed his last job for GFI, testifying that "[w]e were trying to help my wife out" because "[s]he was going bankrupt" and "[s]he could collect a couple thousand bucks." (Tr. 306) He further testified that even after he was "[thrown] out of the Union…I continued to help my wife…." (Tr. 268–269.)

Dale Dotson testified that he provided collateral for loans that GFI took out and he co-signed on some loans, and when GFI closed the bank was foreclosing on the Halstead Avenue building. Realty Acquisitions sold the building at 2160 Halstead Avenue in June 2016 for $320,000 and he used $100,000 of the proceeds from that sale to pay off the loans and debts incurred by GFI for his wife. (Tr. 264–266; 313–315; 363.) He also testified that as of 2013, GFI was behind in its rent payments to Realty Acquisitions and Pat owed him money. (Tr. 312.) In January 2016, approximately 6 months prior to the sale of the Halstead Avenue property, Dale auctioned off GFI's equipment. (Tr. 355–363; GC Exh. 32.) He hired Rosen and Company to advertise and conduct the auction. (Tr. 356.) Dale testified that the auction company's advertisement for the auction of that equipment listed GMS as the company involved. (Tr. 357.) However, he testified that GMS was not the company whose property was being auctioned, and that the auction company's advertisement was a mistake and that he never actually saw the advertisement. (Tr. 357.) Dale testified that GFI owed him money for rent, and he acknowledged that he received $5000 from the proceeds of the auction. (Tr. 362.)

Previously, in 2015, the Union became aware of the existence of GMS and it investigated whether it was an alter ego of GFI. That investigation included a letter dated February 9, 2016, to GFI requesting information pertaining to GFI's and GMS' organization, structure, and work in order to determine the relationship between the two companies. GFI responded on July 11, 2016, providing information to half of the numbered requests for information, and it failed to provide information to the other half of the numbered requests. The Union also made a request for information to GMS dated July 29, 2016, seeking the same information. GMS did not provide any information to the Union as requested.

It is undisputed that GMS has never recognized the collective-bargaining agreement with the Union that GFI was signatory to, it has never complied with any provisions of that collective-bargaining agreement, and it has never made any union benefit contributions under that agreement. (Tr. 332.)

2. The applicable legal principles and analysis

"A company which has not agreed to be bound by the collective-bargaining contract of another company may nevertheless be held to that contract if it is an alter ego of the signing company or if it may be said to constitute a single employer with that company." *Peter Kiewit Sons' Co. & South Prairie Construction Co.*, 206 NLRB 562 (1973), vacated on other grounds 518 F.2d 1040 (D.C. Cir. 1975), affd. in part, vacated in part, and remanded, 425 U.S. 800 (1976). While the Board and the courts have sometimes used the terms alter ego and single employer interchangeably, the United States Supreme Court delineated what it meant by alter

ego in *Howard Johnson Co. Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees, etc.*, 417 U.S. 249, 259 fn. 5 (1974):

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. See also *Don Burgess Construction Corp. d/b/a Burgess Construction*, 596 F.2d 378 (4th Cir. 1979), enfg. 227 NLRB 765 (1977).

The determination of alter ego status is a question of fact for the Board, resolved by an examination of all attendant circumstances. *US Reinforcing, Inc.*, 350 NLRB 404, 404 (2007), citing *Southport Petroleum v. NLRB*, supra at 106. In determining whether two employers are alter egos, the Board considers a number of factors, including: whether the two have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers. *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016); See *Cofab, Inc.*, 322 NLRB 162, 163 (1996), enfd. sub. nom. *NLRB v. DA Clothing Co.*, 159 F.3d 1352 (3d Cir. 1998). No one factor is determinative in the analysis, nor do all of these indicia need to be present for finding alter ego status. Id; *Fugazy Continental Corp.*, 265 NLRB 1301, 1301–1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). Unlawful motivation is not a necessary element of an alter-ego finding, but the Board will consider whether the purpose behind the creation of the alleged alter ego was to evade another employer's responsibilities under the Act. *Island Architectural Woodwork, Inc.*, supra, slip op. at 4; *Fugazy Continental Corp.*, supra at 1302; *Fallon-Williams, Inc.*, 336 NLRB 602, 602 (2001). The General Counsel bears the burden of proof to establish whether entities are alter egos. Id., slip op. at 4; see *A.D. Conner, Inc.*, 357 NLRB 1770, 1785 (2011).

a. Ownership and Financial Control

(1) The Respondents do not have common ownership

GFI and GMS are separately owned. While Pat Dotson was the sole shareholder of GFI, her spouse, Dale Dotson, never owned any shares in GFI, and he never held an officer position with that company. Likewise, Dale Dotson was the sole owner and shareholder of GMS and Pat Dotson never had an ownership or membership interest in GMS, she has never owned shares of stock or held an officer position with that company, she is not a partner in that organization, she has never loaned money to GMS, and she has never been employed in any capacity or performed any work for GMS. (Tr. 537–538.) It is undisputed that GMS is a separate Ohio corporation and maintains separate Worker's Compensation coverage, separate licensing, and separate insurance coverage, it has a separate Tax ID with the Internal Revenue Service, and it filed separate tax returns.

The owners nevertheless share a spousal relationship. Despite the fact that Pat and Dale Dotson reside at different addresses and Pat testified that their marriage was "on the rocks," they remained married. (Tr. 174; 211–212.) While not an owner of GFI, Dale Dotson co-signed for

loans to fund GFI and in addition to being an employee he was also GFI's landlord as the sole owner of Realty Acquisitions, which owned the Halstead property where GFI was located. (Tr. 207; 309.) GFI had a month-to-month lease, which was not reduced to writing. (Tr. 312.) After GFI went out of business in 2014, it left its equipment. In January 2016, Dale Dotson held an auction at the Halstead location and auctioned off, among other things, GFI's equipment, keeping the proceeds. The reason Pat Dotson left the equipment is not reflected in the record. In addition, in June 2016, Dale Dotson sold the Halstead property and used some of the proceeds to pay off GFI's debts for his wife. (Tr. 363.) In addition, toward the end of his tenure with GFI (in particular on the Justice Center job), Dale Dotson worked without pay.

The General Counsel argues the fact that Dale Dotson auctioned off GFI's equipment and kept the proceeds, used the proceeds for the sale of the Halstead property to pay off GFI's debts, and he worked for free for GFI at the end of his time there, was an "acknowledgement of [his] shared ownership." (GC Br. 26.) GMS argues, on the other hand, that Dale Dotson was simply helping out a family member by working for free at the end of its operation, and by paying off the debts of his wife's company. I find merit in GMS's argument.

The record reflects that Dale Dotson worked without pay at the end of his tenure with GFI and used some of the proceeds from the sale of property to pay off GFI's debts to help his wife who was having financial problems. In this connection, Dale Dotson credibly testified that he worked for free at the end of his time with GFI, and in particular on the Justice Center job, to help his wife because she was going bankrupt, and he wanted to help he get whatever money she could get so that she could pay her bills. (Tr. 303–306.) He also testified that when GFI went out of business, it owed him money as the landlord, thus it is plausible that he would keep some of the proceeds from the auctioned off equipment. There is no evidence to rebut Dale Dotson's assertions that these actions were simply an attempt to assist his family member, but the General Counsel nevertheless argues that his testimony and assertions should be discredited.

In instances where the testimonies of the General Counsel's witnesses differ from that of the Respondent's witnesses, the finder of fact must determine the credibility of the witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, *Inc.,* 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, *Inc.,* 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates*, *LLC*, 349 NLRB 939, 939–940 (2007).

In this case, the testimonies of Dale and Pat Dotson were not generally rebutted by the testimony of witnesses called by the General Counsel. Nevertheless, the General Counsel argues that Dale Dotson's testimony should not be believed because he was allegedly incredible and inconsistent. In particular, the General Counsel argues that Dale and Pat's testimony regarding

the use of a burgundy or maroon vehicle (van) was inconsistent and therefore none of their testimony should be believed. In this connection, the record establishes that when GFI went out business in 2014, Pat either gave the van to Dale or sold it to him for $200, and he used it in performing work for GMS during the first two years of GMS's existence. Even though Pat's and Dale's testimony regarding what happened with the van was somewhat confusing and inconsistent,[9] I nevertheless observed their demeanor at the trial and was convinced that both were credible witnesses who appeared honest and sincere in their demeanors. Other than the testimony on that issue, they generally presented testimony that was convincing and plausible. Thus, I credit their testimony, which was mostly uncontradicted, and I do not find that Dale's actions in helping Pat were an "acknowledgement of [his] shared ownership." The record is devoid of any credible evidence establishing that Dale had any ownership interest in GFI, and likewise that Pat had any ownership interest in GMS. Therefore, GFI and GMS do not share common ownership.

(2) The evidence does not establish substantially identical ownership on the basis of the familiar relationship

The Board has held that while substantially identical ownership is not a *sine qua non* of alter ego status, it is nevertheless an important factor. *US Reinforcing, Inc*., 350 NLRB 404, 404 (2007); *AC Electric*, 333 NLRB 987, 1001 (2001), enfd. sub. nom. *ECM Enterprises v. NLRB*, 63 Fed.Appx. 521 (D.C. Cir. 2003). In fact, the Board has made it clear that it will only find alter ego status absent common ownership in narrowly defined situations:

> Although common ownership is not a prerequisite for an alter ego finding, the Board has found such a relationship only where both companies were either wholly owned by members of the same family or nearly totally owned by the same individual or where the older company continued to maintain substantial control over the business claimed to have been sold to the new company. *US Reinforcing, Inc*., supra, citing *Superior Export Packing Co.*, 284 NLRB 1169, 1170 (1987), enfd. mem. Sub nom. *Meadowlands Hy-Pro Industries v. NLRB*, 845 F.2d 1013 (3d Cir. 1988).

Absent those limited circumstances, "the lack of substantially identical common ownership precludes a finding" of alter ego status. *US Reinforcing, Inc*., supra at 405; *Superior Export Packing Co*., supra at 1170.

"[W]hen the ownership of two companies is held by members of the same family in varying proportions, the Board does not automatically find either that there is or that there is not common ownership for the purposes of an alter ego analysis." *Adanac Coal Co., Inc*., 293 NLRB 290 (1989). However, the Board has held that there may be an inference of substantially identical ownership for purposes of an alter ego analysis where "members of the same family" or

[9] Even though Pat Dotson testified that she gave the van to Dale (Tr. 203; 207), she later appeared confused and testified that she believed she gave the van to a friend for a couple hundred dollars. (Tr. 206.) Finally, she testified that she provided the van to Dale for "a short period of time" for $200 before he sold it to a friend named Mark Rose. (Tr. 236–237.) Dale Dotson admitted that he used the van for several years at GMS, but he also appeared confused on this subject, testifying initially that he was given the van, and later testifying that he gave Pat $200 for the van. (Tr. 262.)

"people in a close familial relationship" are owners of the companies alleged to be alter egos. In that regard, the Board has found that "where members of the same family are the owners of two nominally distinct entities, which are otherwise substantially the same, ownership and control of both of the entities is considered substantially identical." *Cofab, Inc.*, 322 NLRB 162, 163 (1996), enfd. mem. Sub nom. *NLRB v. DA Clothing Co.*, 159 F.3d 1352 (3d Cir. 1998); see *Fallon-Williams, Inc*., 336 NLRB 602, 602 (2001); see also *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976).

In *US Reinforcing, Inc*., supra, the Board held that the reason it may infer substantially identical ownership in the context of familial relationships is "not simply the apparent alignment of interests that family members share." Id at 406. In this connection, the Board explained in *First Class Maintenance Services*, 289 NLRB 484, 485 (1988), that:

> [A] finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owners of two companies. Rather, each case must be examined in the light of all the surrounding circumstances. In particular, the Board focuses on whether the owners of one company retained financial control over the operations of the other. [Internal citations omitted.]

The Board, in applying these principles, has held that it will only find common ownership in the "close familiar relationship" context when "the owners of one company exercise considerable financial control over the alter ego." *US Reinforcing*, supra at 406, citing *Adanac Coal Co*., 293 NLRB 290, 290 (1989) (no common ownership found despite alleged alter egos being owned by brothers); see also *Midwest Precision Heating & Cooling, Inc*., 341 NLRB 435 (2004), enfd. 408 F.3d 450 (8th Cir. 2005). "Thus, the inquiry at the heart of the 'close familial relationship' inference concerns the degree of financial control the owner of one company has over the other company." *US Reinforcing*, supra at 406.

The evidence in this case does not establish that Pat Dotson, GFI's owner, retained financial control over the operations of GMS such that her spousal relationship with Dale Dotson warrants the application of the "close familial relationship" exception. The credible and undisputed testimony is that Dale independently incorporated and financed GMS and was the only person authorized to conduct business on its behalf. Even though Dale and Pat Dotson's marriage was "on the rocks," they remained married and an inference of "close familiar relationship" is therefore appropriate in this analysis. However, I find that inference is overcome by the undisputed fact that Pat Dotson's company went out of business and she had no continuing role at GMS and no financial control over GMS. There is also no evidence that she had anything to do with the creation, financing, or operation of GMS. As mentioned above, it is well established that the Board will only find common ownership in the "close familial relationship" context when the "owners of one company exercise considerable financial control over the alter ego." *US Reinforcing*, supra at 406. That critical "financial control" factor is simply not present in this case.

The Board has refused to find alter ego status in similar cases where close familiar relationships existed between the owners of two companies, but the owners of the initial company did not exercise considerable financial control over the alleged alter ego. In *First Class*

Maintenance, 289 NLRB 484 (1988), involving one company owned by parents and the other owned by their son, the Board did not find common ownership. In that case, the Board found that the son conducted his operations independently and there was no evidence that his parents retained financial control over the operations of the alleged alter ego. The Board held that substantially identical ownership is not compelled merely because a close familial relationship existed, but instead it "focuses on whether the owners of one company retained financial control over the operations of the other." Id. at 485. In that case, although there were substantially identical customers, operations, equipment, and business purpose, there was not substantially identical ownership, management, or supervision; nor was there evidence of unlawful motivation on the part of the parents or the son. Id. at 486. Similarly, in *Adanac Coal Co*., 293 NLRB 290, 290 (1989), the Board found no common ownership despite the alleged alter ego being owned by brothers. In that case, the Board found that one brother alone was responsible for selling and shipping coal, negotiating loans, and establishing terms and conditions of employment at the first company, and that the other brother alone was responsible for running the alleged alter ego. Id. Under those circumstances, the Board found that the General Counsel did not establish that the two companies had substantially identical ownership. Id.

Likewise, in *Deer Creek Electric*, 362 NLRB No. 171 (2015), the Board considered the relationship between family members Rick and Sandra Moloney, the owners of Deer Creek and the brother-in-law and sister, respectively, of Cheri Jackson, the owner of Black Hills (the alleged alter ego). In that case, the Board found the respondent's did not share substantially identical ownership based, inter alia, on the fact that there was no record evidence that either Rick or Sandra Moloney exercised any financial control over Black Hills or over Cheri Jackson. Id. slip op. 1–2.

(3) There is no evidence that GFI maintained substantial control over GMS and the General Counsel's arguments in that regard are without merit

As mentioned above, there is no evidence that GFI maintained substantial control of the operation of GMS. The two companies were separately owned and there is no evidence of any shared financial relationship between the entities. While it is true that Dale made an effort to help Pat, whom he testified was going bankrupt, I find there is a distinction between involvement to help his family member, as opposed to owning and financially controlling the company. Critically, however, the issue is not whether Dale (the owner of the alleged alter ego) had substantial control over the initial company. The issue is whether Pat (the owner of the initial company) maintained substantial control over GMS, the alleged alter ego. On that critical issue, and most importantly, there is no evidence that Pat Dotson maintained any control over, or in fact had anything at all to do with the business that is claimed to be a disguised continuance of GFI. There is also no evidence that Pat capitalized on the new company that was created independently and separately by Dale. Given that it is the General Counsel's burden to prove the existence of an alter ego relationship, I find that the General Counsel has failed to substantiate that Dale Dotson's attempts to help his wife by working for free at the end of his tenure at GFI and helping to pay off some of her debts from her failing business, or Pat's either giving or selling GFI's used van to Dale for his use when he started up his GMS business, warrants a finding of a sham. See, *First Class Maintenance*, 289 NLRB 484, 485 (1988) (the Board found that the gift of used equipment is insufficient evidence on which to conclude that substantially identical ownership exists).

On the subject of "substantial control," I note that the General Counsel argues that Dale Dotson, who maintained control over GMS, also maintained "substantial control" over GFI when he worked there, based on the fact that he was in charge of the work at the jobsites and Pat Dotson "lacked the knowledge, skill set and experience to run a glazing contractor business on her own." (GC Br. 28.) As basis for that assertion, the General Counsel also points out that Pat Dotson allegedly lacked knowledge about the tools and she "did not directly oversee glazing projects." (GC Br. 28.) While the record does reflect that Dale Dotson had glazing expertise, many years of experience in the glazing field, and was a lead foreman on the jobsites along with other foremen, there is no evidence that Pat Dotson was unable to run and control GFI's business, and she operated that business for many years. In fact, her testimony that she held the positions of owner, president, and controller of GFI was unrebutted, and she testified that she knew how to use the majority of the tools listed in the collective-bargaining agreement. (Tr. 182; 221.) She was also responsible, along with project manager and estimator, Tony Augustine, for ordering materials, supplies, and products at GFI. (Tr. 185; 455.) Thus, I find no merit in the argument that Dale Dotson exercised "substantial control" over GFI.

The General Counsel also argues that Dale Dotson's auctioning off GFI's abandoned equipment suggests that his standing at GFI may have been more than simply being an employee, thereby inferring that he exercised control over GFI. In this case, the evidence is insufficient to establish such control, and I find no merit in that argument. As mentioned above, Dale credibly testified that GFI owned him money for the rent when it was closing, and therefore it is entirely plausible that he would attempt to recoup some of that money by selling off some of the equipment that was abandoned. Notwithstanding the General Counsel's arguments that Dale Dotson allegedly maintained "substantial control" over GFI, that really is not the relevant issue in the Board's established analysis of whether substantially identical ownership exists. As mentioned above, the appropriate issue is whether Pat Dotson, the owner of the initial company, had substantial control over GMS, the alleged alter ego. Critically, the undisputed evidence establishes that she did not. Under these circumstances, I find that the inference of the exceptions to the common ownership requirement have been overcome by the undisputed evidence that Pat Dotson did not have financial control over GMS or any connection to that company other than the fact that she remained married to Dale Dotson. Therefore, I find that the General Counsel failed to demonstrate by a preponderance of the evidence that the two companies had substantially identical ownership.

Finally, despite the fact that the Board has found substantially identical ownership on some occasions when members of the same family own the suspected alter egos,[10] it has done so when most of the other factors militated a finding of alter ego status. I find those cases distinguishable from the instant case where, as will be discussed below, the other factors relevant to this analysis do not support an alter ego finding.

b. Management and Supervision

Pat Dotson was undisputedly the owner and manager of GFI. She managed the office and ran the operation, while Dale Dotson was one of the foremen who supervised the work being

[10] See e.g., Walton Mirror Works, 313 NLRB 1279, 1284 (1994) (owners were brothers-in-law).

performed. Both Pat and Dale Dotson testified that Dale did not hold any officer positions with GFI,[11] and conversely, Pat Dotson did not hold any management or officer positions with GMS. At GMS, Dale Dotson was the owner and the only manager and supervisor. He ran the business by performing the administrative functions (with the assistance of his daughter's bookkeeping), and he performed the installation work.

With regard to supervision, Pat Dotson managed the office and the operation of the business. GFI's supervisors consisted of Dale Dotson and several other foremen who ran the jobs for GFI, namely Kyle Conway and Eric Butler. The record also reflects that Anthony Augustine served as a supervisor for GFI. Conversely, the undisputed record evidence establishes that GMS's only supervisor was Dale Dotson, who previously worked for GFI. Thus, the management and supervision of the two companies was not "substantially identical," and that factor does not militate in favor of finding an alter ego relationship existed.

c. Business Purpose

The evidence establishes that even though GFI and GMS both performed work in the glazing field, they had different business purposes and they performed different types of work. In that regard, Dale Dotson testified that GFI's business purpose was the fabrication and installation of glass, even though it also performed glazing and glass repair work. While Dale admitted that GMS performed some glazing and glass repair work,[12] such as GFI performed, he testified that GMS's core or main business purpose was to install owner-supplied materials performing single-story interior work for general contractors. (Tr. 546–565.) In that connection, he testified that GMS did not perform glass fabrication work, and he did not have the equipment and machinery to perform such work. Thus, even though GFI and GMS performed similar glass and glazing work, the evidence is insufficient to establish that GFI and GMS had substantially identical business purposes.

d. Operations and Premises

While the operations of GFI and GMS were similar in that they both performed some glass installation and repair work, they were nevertheless different in that much of GFI's work consisted of glass cutting and glass fabrication, which was not performed by GMS. The record reflects that when employed by GFI, Dale Dotson performed the glass fabrication work by cutting, beveling, and polishing glass. (Tr. 55–57.) GFI took large sheets of glass and cut them to size, bevel the edges, polish them, and otherwise fabricated them into a final product by utilizing a machine driven process. (Tr. 225–226.) In performing fabrication work, GFI had special machinery for that work, which included beveling machines, glass cutting machines, glass cutting tables for the fabrication of large sheets of glass, and polishing machines to polish the fabricated glass. (Tr. 76–77; 104; 233.) Much of GFI's operation thus consisted of glass cutting and fabrication work, and then installing that glass in storefronts and doors. (Tr. 99–100.) GFI also fabricated at its facility the aluminum framing and components that went into the

[11] Union Official Michael Turkal acknowledged that Dale Dotson never represented to him that he was an officer of GFI. (Tr. 487.)

[12] See Tr. 575–578, 584.

exterior glass systems it sold. (Tr. 232–234.) GFI also cut glass and sold it directly to customers, which they could pick up at GFI's facility. (Tr. 81–82.)

With regard to GFI's glass installation, that work was overseen by Dale or other GFI foremen and some of that work included windows that were already fabricated. (Tr. 57; 73.) Pat Dotson credibly testified that storefront installation work did not comprise a majority of GFI's business. (Tr. 203.) In fact, she testified that GFI's primary business and most of its work consisted of cutting and glass fabrication work. GFI also performed replacement or service work that consisted of exterior caulking and replacing glass units. (Tr. 100.) Pat Dotson testified that "very little" of its business, however, consisted of glass installation and window repair. (Tr. 192.) GMS also performed installation work, but the record establishes there were differences between the Respondents' work. Dale Dotson credibly testified that the installation work he performed at GFI was different than the work he performed at GMS because most of his work at GFI involved installation of glass that he fabricated, cut, beveled, and polished. (Tr. 539.) Conversely, the installation work done by GMS consisted of installing pre-fabricated glass, metal, and wood. (Tr. 279.) Thus, besides installing glass, GMS provided sheet metal and carpentry work. (Tr. 379–380.) In that connection, GMS had a contractor's license for the State of West Virginia where it performed finish carpentry, glass, and glazing work, which was different from the work that GFI performed. (Tr. 525–526.)

Dale Dotson testified that GFI also installed "curtain walls," which were 14-16 feet high and usually installed over two stories high (anything under that would be considered storefront material). (Tr. 541–542.) Such above-ground work by GFI required the use of lifts, cranes, and scaffolding. (Tr. 534.) Consistent with its installation of exterior glass systems on multi-story buildings, GFI was hired to train employees at the Independence Excavation Company on how to remove glass safely on the multi-story Federal Building in downtown Cleveland. (Tr. 231–232.) Conversely, GMS' work was on the ground level involving low-level installation of interior store front glass using materials fabricated by other sources. (Tr. 534; 565–566.) Dale Dotson testified that most of his GMS jobs involved owner-supplied aluminum, metal, and glass, and that much of the work did not involve glass, but instead involved aluminum composite metal panels (ACM panels). (Tr. 533; 541–542.) In fact, according to the uncontradicted testimony of Dale Dotson, 80 to 90 percent of GMS's business was for Victoria Secret, and that company designed its own storefront using a combination of mall front, storefront, and curtain walls, and all three involved different types of installation. (Tr. 541–542.) Such combination systems were installed in the State of Colorado by GMS, and it did not involve standard glazing, but a combination of all three materials. Sometimes the installation work included poly carbonate panels and glass. (Tr. 543.) In addition, Dale Dotson testified that while his work for GFI involved insulated glass for exterior systems that were weather proof, the glass installation work for GMS only involved interior glass systems that were not weather resistant. (Tr. 544.)

Besides the fact that GMS did not fabricate, cut, bevel, or polish glass, differences in the operations are also reflected by the work that Dale Dotson performed at the alleged alter ego. At GMS, where most jobs involved owner-supplied aluminum, metal, or glass, Dale Dotson performed all the duties that pertained to completing the whole job, from start to finish. (Tr. 540–541.) Unlike his work at GFI, he performed the following work at GMS: the bookkeeping, bidding, estimating, securing the contracts for work, placing the orders with suppliers, billing the customers, the payroll, paying the company's bills, field measuring on jobs, booking hotels for

travel, writing employee checks for their per diems, paying the company's credit card bills, and making all decisions as to who worked there, what type of work was to be done, and how much employees were paid. (Tr. 539; 540–541; 255-256.)

In support of its argument that the respondents performed the same work, the General Counsel asserts that both companies performed "fabrication" work. As mentioned above, Dale Dotson performed all the work from start to finish for GMS, and that work involved pre-fabricated items, and it generally did not require the fabrication of any materials. (Tr. 541.) The General Counsel argues, however, that even though Dale Dotson testified he did not perform fabrication work at GMS, some of GMS's bids included provisions that GMS would "fabricate" materials. (R. Br. p. 31; referencing GC Exh. 67.) In reviewing those bids which reference "fabrication," they indicate that GMS would "fabricate" certain items, such as: "fabricate one new header and base to fit the new location;" "fabricate and install owner supplied store front system;" and "[t]he owner supplied storefront should include all materials to fabricate and install storefront system such as screws, caulk, setting blocks, etc. we will also install owner supplied polycarbonate panels and break metal." (GC Exh. 67.) Thus, in asserting that GMS performed the same work as GFI, the General Counsel relies on Dale Dotson's statements in his bids that he would "fabricate" certain items for those customers.

The fabrication of glass was defined in the record by Union Official Michael Turkal as the cutting, beveling of the edges, polishing, and sale of glass products. (Tr. 443–444.) There is a distinction between the undisputed "fabrication" of glass work that GFI performed and the alleged "fabrication" work that GMS performed (or indicated it could perform in several of its bids). Those distinctions were explained by the credible testimony of Dale Dotson, who testified that GMS did not perform glass fabrication work, but instead dealt with owner-supplied materials that were prefabricated. (Tr. 533.) On those rare occasions when he had to "fabricate and install owner supplied store front system[s]," (as reflected in one of the bids), he would use materials such as screws, caulk, and setting blocks. (GC Exh. 67.) Most of the time, however, he did not have to fabricate any materials because the majority of the jobs involved owner-supplied aluminum, metal, or glass. (Tr. 540–541.) Critically, the evidence establishes that GMS did not fabricate, cut, bevel, or polish glass like GFI did, and it actually lacked the machinery to do so. Dale Dotson's assertions that GMS did not perform the same fabrication work that GFI performed are thus not only credible, but plausible because GMS lacked the equipment and capability to perform such work.

With regard to the respondents' operations and its employees, the record reflects that the operation at GMS was somewhat smaller than that of GFI. The number of employees at GFI varied, depending on the size and number of the jobs. (Tr. 69–70.) GFI contacted the Union Hall for glazers and it usually used between 2 and 8 glazers at a time. (Tr. 54; 95.) On certain jobs that involved large pieces of glass, the crew might be larger. For example, Anthony Augustine testified that on a Justice Center job where they had "some real big glass," they had a crew of 10 to 12 employees. (Tr. 69.) GFI's supervisors consisted of Dale Dotson, Eric Butler, and Kyle Conroy, who each supervised approximately 4 to 8 employees. (Tr. 96; 235.) The number of employees at GFI fluctuated, depending on the jobs. In April 2013, an insurance declaration page dated April 5, 2013, showed that GFI self-reported 6 employees. (GC Exh. 7.) In 2014, GFI employed 9 individuals, including Pat and Dale Dotson. (GC Exh. 6) Under the collective-bargaining agreement, GFI was obligated to report all union members working every month. (Tr.

461–462.) Those records, which were submitted to the Union, show that the largest monthly workforce GFI reported to the Union was 8 and the lowest was 4. (Tr. 459–464; GC Exh. 63.)

While the employees at GMS varied depending on the work, the record establishes that GMS usually employed a maximum of 4 employees consisting of: Owner and Supervisor Dale Dotson, his daughter Bridgett Dotson, his son Dale Dotson, Jr., and usually one of a number of helpers. (Tr. 534–535.) Bridgett Dotson assisted with the bookkeeping, billing, banking, payroll, and general office work, and she was not previously employed by GFI. (Tr. 353; 534; 536.) Dale Dotson, Jr. started working at GMS sometime in 2015, when GMS started getting business. (Tr. 271.) He was previously employed at GFI where he was an apprentice in the Union and he reported to Foreman Kyle Conway. (Tr. 271.) He performed repelling work and "swing stage" work at GFI on high rises and skylight repairs. (Tr. 271.) He also did repairs of revolving doors and service work. (Tr. 532.) However, Dale, Jr.'s work at GMS differed from the work he performed at GFI. At GMS, his tasks consisted of attending job meetings, mall front layout work, field measuring, layout meetings, and installation work. (Tr. 532.) Dale Jr.'s job responsibilities at GMS also included installing frames, changing oil in the truck, or any other duty related to "going out on the job." He also installed store front windows, carpentry, trim work, and some curtain walls. (Tr. 272–273.) One of the helpers who worked for GMS was Matthew Fridley, who worked as a runner or helper loading/unloading items. (Tr. 535; GC Exh. 49.) He was previously employed by GFI, but it appears his duties differed because Dale Dotson testified that GFI did not employ helpers. At times, other GMS employees consisted of Marcel McCollough, and Matthew Tobin. (GC Exh. 50.) Thus, even though some of GMS's employees previously worked at GFI, their job duties and work they performed at GMS was different.

With regard to the respondents' premises, the record establishes that GFI operated out of the Halstead location, and that GMS, while it was incorporated at the same location, it actually conducted business and its operations after moving to the Sugar Ridge Road location. The General Counsel nevertheless argues that GMS was incorporated and operated out of the same address as GFI, thus showing that the entities were identical. That argument, however, is unavailing because the record establishes that the Respondents operated out of separate locations. Dale Dotson incorporated GMS at the GFI location and he admitted to using the address for business. (Tr. 273.) However, he only used that address during the time that he was starting up the business, and he subsequently moved it to the Sugar Ridge Road property sometime in the Fall of 2014 once it actually started conducting business. (Tr. 172; 252.) Dale Dotson credibly testified that GMS did not actually conduct any work for customers while at the Halstead address. (Tr. 273.) Augustine corroborated that testimony when he stated that while he worked for GMS at the Halstead location, it did not have any customers and it did not perform any work. Nevertheless, in its argument that GMS conducted business out of the same location as GFI, the General Counsel relies on Union Official Turkal's testimony that on occasions throughout late 2015 into the spring of 2016, he observed Dale and Dale, Jr. at the Halstead location "putting stuff on the [maroon] van." (GC Br. 39–40; Tr. 484–485.) Turkal testified that he concluded that "[i]t was still in operation. As far as I knew, it was still Glass Fabricators." (Tr. 483.)

However, I provide no weight to his assertion that GFI, which closed in July 2014, was still operating in November 2015 and early 2016. That assertion is simply not supported by the record evidence. The assertion that GMS was actually performing work there is also not

supported by the evidence. In that connection, Turkal testified that starting in November of 2015 through the winter into 2016, he would stop by the Halstead location "once a month or once every other month." (Tr. 484.) When he went there, he usually "saw no activity." (Tr. 484.) Critically, on that one occasion when he allegedly saw Dale and Dale, Jr. at that location, he testified that he was sitting in his car across the parking lot of the next building, that he never saw the "dark-colored van" leave that location, and he admitted that he "wasn't there long enough." (Tr. 484; 490.) He also acknowledged that he could not see anything else on the van because it was "inside the building" and he "had limited vision." (Tr. 485.) Turkal's testimony amounted to mere speculation that business was being conducted for either GFI or GMS. There is insufficient evidence to establish that the conduct was actually work being performed, or that the conduct he allegedly witnessed constituted GFI conducting business or GMS conducting business out of GFI's location. In fact, Turkal admitted that he was not aware of where GMS operated and that he never actually saw GMS performing work. (Tr. 482; 487; 490.) I therefore find no merit in the General Counsel's argument and I find that the evidence establishes that GFI and GMS operated out of separate premises.

With regard to contact information for the respective companies, Augustine testified that when he worked at GMS, he had a different email address than he did when he worked for GFI. (Tr. 60–61.) Likewise, Dale Dotson testified that his email for GMS was different from the email he had when employed by GFI. (Tr. 261.)

Finally, another difference in the respondents' operations is that GFI's jobsites were mostly located in northern Ohio, more specifically, downtown Cleveland, Ohio. (Tr. 184) On the other hand, most of GMS's work was outside the State of Ohio. In fact, 95 to 99 percent of GMS' work was outside the State of Ohio. (Tr. 368.) GMS performed 4-6 jobs a year for Cahill Construction all across the country, in particular, in the states of New Hampshire, Louisiana, Montana, Texas, Utah, West Virginia, and Colorado, where it is undisputed that GFI never performed work. (Tr. 566–568; 587–588.)

Based on the above, I find that the evidence does not establish that GFI and GMS had substantially identical operations, which does not weigh in favor of an alter ego determination.

e. Equipment

The record does not establish that the Respondents used substantially identical equipment. GFI performed fabrication work and had special machinery for that work, which included power suction cups, beveling machines, machines to cut the glass, glass cutting tables for the fabrication of large sheets of glass, and polishing machines to polish the fabricated glass. (Tr. 76–77; 104; 233.) It also had metal punch machines for placing holes in metal curtain walls and store-front metal, and a metal turning lathe which was used for fabricating metal window frames. (Tr. 83–84; 233; 546–547.) Pat Dotson testified that while GFI cut glass to sell to its customers (which they would pick up at GFI's facility) and it installed storefront windows, the primary form of work was the fabrication and cutting of glass. (Tr. 81–82; 233.) GFI also utilized high-rise equipment for working on windows in buildings that were at higher levels. Some of that equipment consisted of power suction cups, scaffolding, platforms suspended from cables from the tops of buildings, harnesses and rappelling equipment, lifts, cranes, and "swing stage" scaffolding. (Tr. 75–76; 227–228; 233; 237; 546–548.) Pat Dotson testified that she did

not give Dale Dotson any of GFI's equipment or tools after it went out of business. (Tr. 206.)[13] Likewise, Dale Dotson testified that GMS does not use any machinery or tools that belonged to GFI.

In performing his work at GMS, Dale Dotson did not have the equipment that GFI utilized in performing its work, such as glass fabrication, beveling, cutting, or polishing equipment.[14] (Tr. 288; 548–550.) He also did not have or use punch machines or metal turning lathes. (Tr. 58–550.) He specifically testified that GMS did not have cranes, cables, large motorized lifts, or harnesses for work on high rise buildings. (Tr. 296–297.) Instead, he used simple hand tools for installing interior floor level glass which he bought when he started GMS. (Tr. 256-257.) In performing work for GMS, Dale owned and used regular suction cups for lifting and moving glass (as opposed to power cups), a cordless drill, sawzall, circular saw, chop saw, extension cords, files for filing metal, first aid kits, and some ladders. (Tr. 257–259; 546–547.) While GFI also used tools such as suction cups, files, extension cords, first aid kits, ladders, drills, and various saws, it is undisputed that GMS did not possess or utilize the equipment discussed above that GFI used in performing its glass fabrication and cutting work and its high-rise glass work.

The General Counsel nevertheless claims that "GFI and GMS utilized much of the same equipment in the operation of their businesses." (R. Br. 33.) In support of that assertion, the General Counsel points out that Dale used his personal cell phone for both GFI and GMS, and he used bid forms that were the same type of forms he used at GFI, which had GMS's name but nevertheless still contained the fax number that was used by GFI. The General Counsel asserts that an alter ego finding is supported by the shared use of these items. I disagree.

With respect to Dale's use of his personal phone for work at GMS, he testified that he used his cell phone because he did not have a separate business phone. (Tr. 511.) That testimony was not rebutted or contradicted. Thus, I find his use of his personal cell phone for work at GMS, even when he used the same cell phone for work at GFI, is insignificant. With regard to the fact that Dale used the same bid templates or forms on the computer that he used at GFI, he testified that he was unable to alter the bid template on the computer to remove the fax number, so he continued to submit bids using that incorrect information. (Tr. 507.) I find the fact that GMS's bid forms had GFI's old fax number on them, when GMS did not even have a fax machine to use, is equally insignificant in this analysis.

The General Counsel also points out that GFI used a maroon or burgundy Ford Econoline van to transport and install glass, and that GFI gave that van to Dale Dotson who used it for GMS's work. (GC Br. 36.) The General Counsel relies on that fact to support its assertion that both companies had substantially identical equipment. However, I find no merit in that argument. While Dale Dotson admitted that he used the burgundy/maroon van for the first two

[13] Pat Dotson testified that when GFI stopped doing business, some of the equipment and tools were stolen by employees, and the rest she simply left in the building. (Tr. 239.) She testified that she was unaware of whether Dale Dotson sold those items at auction. (Tr. 204–205; 21.7)

[14] Even though Dale Dotson indicated on some job bids for GMS that "we will fabricate one new header and base to fit the new location," he testified that neither he personally, nor his company, fabricates the product. Instead, he testified that he orders the product already fabricated, and that at GMS he did not have a fabrication shop. (Tr. 580–584; GC Exh. 61.)

years GMS was in business, he testified that he got rid of it and then used a 2015 or 2016 white transit van and an F-250 truck to perform his work for GMS. (Tr. 259–260.) Pat Dotson testified that she gave or sold the van to Dale, that the van in question was "really, really old and it had hundreds of thousands of miles on it," and that she "needed to get rid of it." (Tr. 206; 236) I find that gifting the used vehicle or equipment in this case was insignificant and inconsequential, and it is insufficient to establish that the Respondents' maintained substantially identical equipment. *Deer Creek Electric*, 362 NLRB No. 171, slip op. at 2 (2015); see also, *First Class Maintenance*, 289 NLRB 484, 485 (1988) (The Board found the gift of used equipment from the first company to the alleged alter ego was insufficient evidence upon which to conclude that substantially identical ownership existed). Thus, I find the evidence is insufficient to establish that the Respondents had substantially identical equipment.

f. Customers

While GMS performed work for some of the same customers that GFI had, the evidence establishes that GMS did not assume any contracts for work from any of GFI's customers. (Tr. 89.) Also, for the most part, GMS performed different work for those customers than GFI performed, and those similar customers comprised a very small portion of GMS's business.

GMS has done work for approximately 7 of GFI's former customers. Dale Dotson admitted that GMS's customers who were also GFI customers included: Forest City Enterprises; Zaremba; Rockefeller Building Associates; Omni Lakewood Limited; Art Forum; R&K Sheet Metal; and Viking Refrigeration Company. (Tr. 551–563; GC Exh. 16.) He credibly testified, however, that the work done for each customer was different. In that connection, the details on the work are as follows: (1) for Forest City, GFI performed high level work 8 stories high re-caulking sky light panels on the top of the Skylight Office Tower Building, while GMS performed ground work repairing a door; (2) for Zaremba, he was not aware of what work GFI performed, while GMS ordered insulated glass for that company; (3) for Rockefeller Building Associates, GFI sold and supplied fabricated glass to them; while he could not recall what work GMS performed for them, he stated that GMS never fabricated glass for any customer; (4) for Omni Lakewood Limited, GFI "cut thousands of pieces of glass for them on a constant basis," while GMS fixed a small window on one if their cranes; (5) for Art Forum GFI performed glass fabrication work beveling and cutting mirrors and cut "museum-style" glass which was specially coated, while GMS did not fabricate anything, and he believed he just ordered something for them and "middle-manned it"; (6) for R&K Sheetmetal he could not recall what work either company performed; and (7) for Viking Refrigeration Company GFI supplied mirrors, tempered glass, and fabricated glass good, while GMS fixed a side window that was broken from someone's attempt to break into their building. (Tr. 554–563.) Thus, much of the work that GMS performed for GFI's former customers was different in size, scope, and the nature of the work performed.

In addition, Dale Dotson credibly testified that the work GMS performed for GFI's former customers discussed above, only comprised one or two percent or a "minimal" amount of its total business. (Tr. 263.) As mentioned above, GMS's main business was to install owner-supplied materials performing single-story interior work for general contractors. (Tr. 546–565.) In that connection, GMS's biggest customer was Cahill Construction, which comprised approximately 90 percent of GMS's work. (Tr. 564–566; GC Exh. 16 and 48.) Conversely, GFI

did not perform work for Cahill. (Tr. 566.) That 90 percent of GMS's work for Cahill was also performed outside the State of Ohio, in states such as New Hampshire, New Orleans, Montana, Texas, Utah, West Virginia, and Colorado. (Tr. 567.) The evidence therefore establishes that a small fraction of GMS's work involved some of GFI's former customers, and the work, for the most part, was different from the work that GFI performed. The fact that Respondents had approximately 7 customers that were the same, that is insufficient to establish that GFI's business continued through GMS as a guise. Thus, the evidence does not establish that GFI and GMS maintained substantially identical customers, and this factor also does not militate in favor of finding an alter ego relationship.

g. The purpose behind the creation of GMS and the absence of unlawful motivation

Unlawful motive is not a determinative factor of an alter ego finding. *Fallon-Williams*, 336 NLRB 602, 602–603 (2001). However, the Board will nevertheless consider whether the purpose behind the creation of the alleged alter ego was to evade the earlier employer's responsibilities under the Act. *Island Architectural Woodwork, Inc.*, supra, slip op. at 4. Although it is not determinative, the General Counsel nevertheless argues that GFI created GMS as an alter ego to evade its responsibilities under the Act. (GC Br. 41–42.) The evidence relied upon by the General Counsel in making this assertion is Pat Dotson's testimony that she believed GFI's equipment had been taken or stolen by its union employees, she believed part of the reason GFI went out of business was because some Union workers made errors that cost GFI money, and her statement that she simply did not want to deal with the Union. (Tr. 216–217.)

We may assume arguendo that GFI went out of business for anti-union reasons.[15] The issue, however, is whether GMS went into business with an anti-union motive. In other words, the issue is whether GMS permitted GFI to remain in business through the guise of GMS. The General Counsel has not shown by a preponderance of the evidence that GMS had that motive. Instead, the evidence established that Dale Dotson started GMS on his own volition. The record is devoid of any evidence that GFI, or its owner, Pat Dotson, provided encouragement, prompting, or assistance, to Dale Dotson and his decision to create and operate GMS. There is also no evidence that Pat Dotson had any control over or provided financial support to GMS. In fact, there is no evidence that Pat Dotson had anything at all to do with the creation or operation of GMS. If anything, the record shows that Dale Dotson started GMS because GFI was struggling financially and it went out of business, and he needed to work.

The evidence also fails to establish that GMS was created to evade GFI's contractual and statutory obligations. There is no evidence that Dale Dotson started GMS to avoid GFI's obligations under the collective-bargaining agreement. There is also no evidence that Dale Dotson informed the employees of GMS that it was a nonunion operation, or that if they were union members, they had to withdraw from the union to work there. There is likewise no evidence that the Union tried to organize GMS or that there were antiunion statements or threats attributed to Dale Dotson reflecting GMS's desire to remain a nonunion company. In fact, it was the Union that removed the union workers from GFI's operation in the summer of 2014, when

[15] Such a decision is not unlawful. *Textile Workers v. Darlington Mfg.*, 380 U.S. 263, 273–274 (1965); see also, *US Reinforcing, Inc.*, supra at 408, fn. 12.

GFI was closing its business.[16] According to Dale Dotson, that was around the time he was removed from or was kicked out of the Union.[17] The evidence thus shows that GFI did not remove or discharge the union employees working for GFI in an effort to rid itself of the Union. Instead, it reveals that the Union pulled its workers out of GFI, which was struggling financially went out of business. It is also important to note that, when Union official Turkal last spoke to Dale Dotson at some time in 2016, Turkal did not accuse him of starting up and operating a non-union company as a guise of GFI and in an effort to avoid the contractual obligations of his previous employer. Instead, Turkal asked Dale to come back to work with the Union and "be a glazer for [Local] 181 again." (Tr. 486.) Dale Dotson's only response to that request was that he "was not interested." (Tr. 486.) He did not make any statements or convey anything to the Union that he and his new company did not want to be a union operation or that he was motivated to remain non-union. Therefore, I find there is insufficient evidence to establish that unlawful motivation was a factor in the creation of GMS.

h. Analysis of all factors

In applying the above principles to the facts of this case, the evidence does not establish that GFI and GMS had substantially identical ownership, management and supervision, business purpose, operation, premises, customers, and equipment. In addition, the evidence fails to establish that the purpose behind the creation of GMS was to evade GFI's responsibilities under the Act. As mentioned above, the Board has held that a new company is considered an alter ego or disguised continuance of the old one when "it is set up to enable a company to continue operations while ridding itself of a union, or when the closing of one company and opening of another is used as a means of eliminating a union…." *Hageman Underground Construction*, 253 NLRB 60, 68 (1980).

A close family relationship between the ownership of two companies, which exists in this case, without more, is insufficient to establish that GMS is a disguised continuation of GFI and an alter ego. I note that the General Counsel carries an affirmative burden of proof and must show by a preponderance of the affirmative evidence on the record as a whole that the allegations of the complaint are in truth supported. See, e.g., *Western Tug & Barge Corp.*, 207 NLRB 163, fn. 1 (1973); *Service Marine Co*., 189 NLRB 741 (1971). Suspicion, alone, is insufficient to prove an unfair labor practice. *Kings Terrace Nursing Home and Health Related Facility*, 229 NLRB 1180 (1977). In this case, the General Counsel has not satisfied his burden of proof. The substance of GMS's operation was different from GFI's operation, and GMS was not created for a nefarious purpose, nor was it accomplished through deception. See, *Fallon-Williams*, supra at 602. The Respondents were separately owned and there is no evidence that the owner of GFI had any involvement in the creation of GMS, nor did she have any control, financially or otherwise, over GMS and its operation.

[16] Union Official Turkel testified that at the time GFI was performing work on the Justice Center job in July 2014, the Union "had been forced to pull the manpower from Glass Fabricators as to not incur any more debt to the [Union] funds…." (Tr. 467–470.)

[17] On July 22, 2014, Dale Dotson testified that Mike Turkel approached him at the Justice Center job and told him that the Union was going to have to suspend him. (Tr. 305; 467–468, 487; GC Exh. 28 and 70.)

Accordingly, I find that GMS is not a disguised continuance of GFI or an alter ego, and therefore the Respondents have not violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union and repudiating the collective-bargaining agreement between the Union and GFI, including failing to apply the provisions of that agreement to the operations of GMS.[18]

B. The Allegations that the Respondents Failed to Provide Information Requested by the Union

1. The Facts

Union Attorney Marilyn Widman sent a letter dated February 9, 2016, to Dale and Pat Dotson as representatives of GFI, at the Halstead Avenue, Lakewood, Ohio address. In that letter, the Union asserted that it obtained evidence suggesting that GFI was operating GMS as an "alter ego or double breasted company." (GC Exh. 35.) Union Attorney Kera Paoff testified that the Union requested the information in order to evaluate whether GFI and GMS were a single enterprise or alter ego, and in the letter it informed the Dotsons that is was unlawful to operate an alter ego to avoid their responsibilities under the collective-bargaining agreement between GFI and the Union. (Tr. 402–407; 413.) Widman further stated that "[i]n order to fulfill its statutory duties and responsibilities," the Union needed, and was requesting, information applicable to both GFI and GMS concerning the time period from July 1, 2014, to the present. (GC Exh. 35.) The information request contained 30 inquires pertaining to the structure of the two companies, their personnel and finances, their terms and conditions of work, and other facts that would aid the Union in understanding the relationship between the two companies. With regard to those respective companies, the Union specifically requested the following information:

1) State the business address(es) and identity of all office locations of each company.
2) Identity of each company's business phone and fax numbers.
3) The identity name, title(s) and company of any officer, director, or other management representative who held or holds a position in either company. In each case, also identify the applicable time period.
4) Identity of customers of your company which are now or formerly customers of either company. In each case, also identify the applicable time period and the specific company per customer.
5) Identity of employees of each company.
6) Identity the name, job title, and company of any individual who performed or performs any service, including clerical, administrative, bookkeeping, managerial, engineering, sales estimating, or other services for either company. For each such person, also identify the time period, company and the service in question.

[18] The complaint does not allege that if GMS is found not to constitute an alter ego, GFI nevertheless independently violated the Act by failing and refusing to abide by the collective-bargaining agreement it was signatory to. I note that even if it did set forth that allegation, the Union became aware of GFI's failure to abide by the collective-bargaining agreement in July of 2014, when GFI stopped making payments to the union funds and the Union removed its members from of GFI. Considering that the unfair labor practice charge in this case was filed on April 21, 2016, more than 6 months after the alleged unfair labor practice occurred, the allegation would be untimely under Sec. 10(b) of the Act, and it would appropriately be dismissed.

7) The identity of common insurance carrier(s) used by either company for every insurance-related employment benefit, including health insurance. Specify the exact benefit and company per item.
8) Identity of equipment exchanged, sold or leased between either company. Identify the approximate date and parties involved in the arrangement.
9) Identity any employees, supervisory personnel, or managers who have transferred between either company. For each such person, give job title, current company, approximate date of transfer and company from which the individual transferred.
10) Identity the entire hiring procedure for both companies and provide samples of the application form(s) utilized in processing the application.
11) Describe the type of business in which each company engages.
12) Describe the geographic area in which each company does business.
13) Identity the banking institution, branch location, and account number for each company's bank account(s).
14) Identify the banking institution, branch location, and account number of each company's payroll account(s) not identified above.
15) Identify the principal bookkeeper for each company.
16) Identify the contractor license number(s) for states where the each company does construction business.
17) Identify amount(s) involved, reason(s) for, and date(s) of transfer of any funds between Glass Fabricators and Glass & Metal Solutions.
18) Regarding equipment transactions between Glass Fabricators and Glass & Metal Solutions, identify the purchase, rental, or lease rate, equipment involved, calendar period, and dollar volume of each transaction.
19) Identify where each company advertises for customer business.
20) Identify each company's customers.
21) Identify those persons who bid and or negotiate each company's work.
22) Identify by job title or craft position the number of employees employed by each company per pay period.
23) Identify the skills that each company's employees possess.
24) Identify where each company's employees report for work.
25) Identify by job title or craft position and respective employment dates those employees of Glass Fabricators who are or have been employees at Glass & Metal Solutions.
26) Identify by job title or craft position and respective employment dates those employees of Glass & Metal Solutions who are or have been employees at Glass Fabricators.
27) Identify by job title or craft position and transfer dates those employees otherwise transferred between Glass Fabricators and Glass & Metal Solutions.
28) Identify each company's (a) supervisors, (b) job superintendents, and (c) forepersons or other supervisory persons with authority to hire him, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct employees, or to adjust their grievances, or effectively to recommend such action.
29) Describe each company's compensation program including employee wage rates.
30) Describe each company's fringe benefit program.

(GC Exh. 35)

Besides that fact that GFI denied in its answer to the complaint that the Union made the written request for information regarding its relationship to GMS, Pat Dotson testified that she saw the Union's letter when her lawyer showed it to her, and she admitted that she was aware that the Union requested the information. (Tr. 208.) On July 11, 2016, GFI, by its attorney, Patrick Thomas, responded to the information request via email with the response attached. (GC Exh. 68 and 69.) Thomas provided information or responses to half of the numbered requests for information, specifically to the following numbered paragraphs of the information request: 1, 2, 5, 7, 10, 11, 12, 14, 15, 19, 24, 26, 27, 28, and 30. (Tr. 407–411; GC Exh. 68 and 69.) Although the information request pertained to both GFI and GMS, the only information provided by Thomas on July 11, 2016, pertained to GFI. (Tr. 407–412.) It is undisputed that GFI failed to provide the information requested in paragraphs 3, 4, 6, 8, 9, 13, 16, 17, 18, 20, 21, 22, 23, 25, and 29. (Tr. 407–411; GC Exh. 68 and 69.)

The Union subsequently, by letter dated July 29, 2016, requested the same information from GMS, which GMS admitted it failed and refused to furnish. (GC Exh. 1(h).)

2. The Contentions of the Parties

The General Counsel alleges that the failure to provide information to the numbered paragraphs listed above violated Section 8(a)(5) and (1) of the Act. In addition, with regard to the information that was provided pursuant to the Union's request, the General Counsel alleges that since the information was requested on February 9, 2016, and it was not provided until approximately 5 months later on July 11, 2016, GFI unreasonably delayed in furnishing the information in violation of the Act.

GFI denied these allegations in its answer to the complaint, but presented no argument on that issue at trial and it did not file a posthearing brief in this matter. GMS likewise denied that allegation in its answer, but did not provide any argument on that issue at trial or in its briefs.

3. Analysis

a. Respondent GFI's failure to provide the information

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. Sec. 158(a)(5). It is well settled that an employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to a union that is the collective-bargaining representative of the employer's employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); see also *Central Soya Co*., 288 NLRB 1402 (1988). This duty is not limited to contract negotiations but extends to requests made during the term of the contract for information relevant to and necessary for contract administration and grievance processing. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). The standard for determining the relevancy of requested information is a liberal one and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to

the union in carrying out its statutory duties and responsibilities." Id. at 437. See also *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), and cases cited therein. Therefore, the information must have some bearing on the issue between the parties but does not have to be dispositive. See, *Kaleida Health, Inc.*, 356 NLRB 1373 (2011).

Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). However, information concerning non-unit employees is not presumptively relevant. Where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257-1258 (2007); *Richmond Health Care*, 332 NLRB 1304 (2000); *Associated Ready Mixed Concrete, Inc.*, 318 NLRB 318 (1995), enfd. 108 F. 3d 1182 (9th Cir. 1997). Regarding requested information which pertains to matters outside the bargaining unit, which is not presumptively relevant, the information must be provided if the surrounding circumstances put the employer on notice as to the relevance of the information or if the union shows why the information is relevant. *National Extrusion & Mfg. Co.*, 357 NLRB 127 (2011). The Board has held that where a showing of relevance is required because the request concerns nonunit matters, the burden is "not exceptionally heavy." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258; *Knappton Maritime Corp.*, 292 NLRB 236, 238–239 (1988).

The Board has held that information requested by a union concerning the existence of an alter ego operation falls into the category of information that is not presumptively relevant. *Trim Corp. of America*, 349 NLRB 608, 613 (2007). Thus, when a union requests information relating to an alleged alter ego relationship, the union bears the burden of establishing the relevance of the requested information. *Consolidated Air Systems*, 360 NLRB No. 97, slip op. at 5 (2014), citing *Reiss Viking*, 312 NLRB 622, 625 (1993); See also *Piggly Wiggly Midwest*, 357 NLRB 2344, 2344 (2012). A union cannot meet its burden based on a mere suspicion that an alter ego relationship existed; it must have an objective, factual basis for believing that the relationship exists. See *M. Scher & Son, Inc.*, 286 NLRB 688, 691 (1987). Under Board law, the union is not obligated to disclose those facts to the employer at the time of the information request. *Baldwin Shop 'N Save*, 314 NLRB 114, 121 (1994). Neither is the union obligated to show that the information which triggered its request was accurate or even ultimately reliable. *McCarthy Construction Co.*, 355 NLRB 50, 5 (2010) affd. and incorporated by reference at 355 NLRB 365 (2010); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). Instead, it is sufficient that the General Counsel demonstrate at the hearing that the union had a reasonable, objectively-based belief at the time of the request that such a relationship existed. *McCarthy Construction Co*., 355 supra at 51-52; see generally *Cannelton Industries*, 339 NLRB 996, 997 (2003), and cases cited therein. The "reasonable belief" standard, however, does not require that the union show "the requested information would establish the existence of an alter ego operation." *Trimm Corp. of*

America, 349 NLRB 608, 613 (2007), citing *Pence Construction Corp*., 281 NLRB 322, 324-325 (1986); *Reiss Viking*, supra at 625–626.

The Union has met its burden in this case. In policing the collective-bargaining agreement with GFI, the Union requested the information to determine what, if any, relationship existed between GFI and GMS, and whether GMS was a disguised continuance or alter ego of GFI based on its observation that Dale Dotson was performing glazing work after GFI shut down. The Union informed GFI of that objective evidence in its written request for information that it had an "objective factual basis" for believing that an "alter ego or double breasted" relationship existed between the two companies, and that the information was necessary and relevant to carrying out its statutory duties and responsibilities in representing GFI's employees. (GC Exh. 35.) Thus, GFI was aware of the reasons for which the Union requested the information, and GFI had an obligation to provide any information relevant to the issue whether GMS was an alter ego of GFI. For the paragraphs of the information request in which GFI failed to provide any information as requested, it failed and refused to provide information that was necessary and relevant to its duties to represent employees, in violation of Section 8(a)(5) and (1) of the Act.

b. Respondent GFI's delay in providing information

The Board has held that unreasonable delays in furnishing information are as much violations of Section 8(a)(5) as refusals to provide information. *Monmouth Care Center*, 354 NLRB 11, 51 (2009), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). It is established that the duty to furnish requested information cannot be defined in terms of a per se rule. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). Instead, a reasonable good-faith effort to respond to the request "as promptly as circumstances allow" is required. See *Woodland Clinic*, 331 NLRB 735, 737 (2000). In evaluating the promptness of an employer's response, the Board considers the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *West Penn Power Co*., 339 NLRB 585, 587 (2003), citing *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005).

With regard to the information request paragraphs in which GFI provided information on July 11, 2016, it took over 5 months to provide the information pertaining to its basic business practices. That information should not have been complex, and it should have been readily available and easily retrieved. GFI failed to produce any evidence establishing that the information sought was complex, difficult to retrieve, or complex in nature. It likewise failed to offer an explanation or reason for the fact that it took 5 months to furnish that information. When an employer does not have the requested information or requires additional time to gather such information, it is obligated to convey that it does not have the information or requires additional time to get it, and unreasonable delays in doing so have been found to violate the Act. *Postal Service*, 332 NLRB 635, 638–639 (2000). Based on the well-established Board law, I find that GFI unreasonably delayed in providing the Union with the information requested in those paragraphs in violation of Section 8(a)(5) and (1) of the Act. See, *Comar, Inc*., 349 NLRB 342, 348 (2007); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (where the Board has found that similar delays in providing information have violated the Act).

c. Respondent GMS' failure to provide information

Since there is insufficient evidence to establish that GMS is a disguised continuance and alter ego of GFI and that it is therefore not bound by any contractual relationship with the Union, it did not have an obligation to provide the Union with the information requested. It's failure to provide the Union with the information it requested was therefore not a violation of the Act. Accordingly, that complaint allegation is dismissed.

C. *Respondent GMS' Argument Regarding Union Counsel's Testimony at Trial Lacks Merit and is Dismissed, and the Objections to such Testimony are Overruled*

The General Counsel called Union Attorney Kera Paoff twice as a witness to testify regarding the Union's February 9, 2016 and July 29, 2016 requests for information. Paoff specifically testified about the correspondence between the Union and the Respondents regarding the requests, the authenticity of the information request documents and GFI's response, and the reasons the Union required the information it requested. Although both Respondents denied the substantive allegations related to the Union's information requests in their respective answers, neither Respondent offered any evidence to rebut Paoff's testimony. Paoff's testimony authenticated the information that has been placed at issue in this case due to the Respondents' denials of the complaint allegations.

At the time of Paoff's testimony, Counsel for Respondent GMS objected to her testimony on a theory that Paoff's testimony was improper under the Ohio Rules of Professional Conduct. (Tr. 401–403; 429–430.) On both occasions of her testimony, Counsel for GMS stated the objection to her testimony, but was unable to specify exactly which rule his objections were based upon. (Tr. 401–403; 429–439.) On both occasions the objections were overruled, but the parties were provided an opportunity to brief that issue.

Respondent GMS failed to provide additional clarification regarding the objections, and it did not address that issue in its post-hearing brief. However, the General Counsel and the Union point out in their post-hearing briefs that Rule 3.7 of the Ohio Rules of Professional Conduct, entitled "Lawyer as Witness," states as follows:

> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case;
> (3) The disqualification of the lawyer would work substantial hardship on the client.

Comment 3 to the Rule states that "if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical."

Comment 4 to the Rule provides that:

> [D]ivision (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on

> the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification of the lawyer's client.
> Ohio Prof. Cond. Rule 3.7.

Federal Rule of Evidence 601 states:

> Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

State law on the competency of witnesses, however, does not apply in Board proceedings because the Act is a federal statute and Section 10(b) of the Act provides that the federal rules of evidence shall apply to Board proceedings "so far as practicable." Therefore, unlike the federal courts, the Board does not pass on questions of ethical propriety of a party's trial attorney testifying in a Board proceeding. Instead, the Board leaves such issues to state bar associations to decide. The Board has therefore determined that, when a trial attorney's testimony is otherwise relevant and competent, objections based on canons of ethics should be overruled. *Reno Hilton*, 319 NLRB 1154, 1185 fn. 18 (1995); *Operating Engineers Local 9 (Fountain Sand Co.)*, 210 NLRB 129 fn.1 (1974); *Wells Fargo Armored Service Corp.*, 290 NLRB 872, 873 fn. 3 (1988); See also, *Page Litho, Inc*., 311 NLRB 881 fn. 1, 889 (1993) (citing *Wells Fargo*, supra, and disavowing the judge's statement that counsel was precluded ethically from appearing as a witness), enf. denied in part on other grounds mem. 65 F.3d 169 (6th Cir. 1995).

In this case, both Respondents denied the complaint allegations pertaining to the failures to provide information, but offered no evidence to rebut any of those allegations. I find that Paoff's testimony, which authenticated the information placed in issue by the Respondents' denials of the complaint allegations, was clearly relevant and competent. Consistent with long-standing Board precedent, the objections to her testimony were properly overruled. *Reno Hilton*, supra; *Operating Engineers Local 9 (Fountain Sand Co.)*, supra; *Wells Fargo Armored Service Corp.*, supra; See also, *Page Litho, Inc*., supra. This finding is further supported by case law where labor counsel have testified in Board proceedings on the behalf of charging party unions. See e.g. *A-Plus Roofing, Inc.*, 295 NLRB 967 (1989) (where charging party union's attorney of record was the only witness presented at the hearing); *Coalite, Inc*., 278 NLRB 293 (1986) (charging party union's attorney of record testified about bargaining). In addition, labor counsel have testified on issues pertaining to requests for information. *Albertson's Inc.*, 351 NLRB 254 (2007) (respondent's labor counsel testified regarding an information request); *Tennessee Steel Processors*, 287 NLRB 1132 (1988) (respondent's counsel of record testified regarding the charging party union's information request).

CONCLUSIONS OF LAW

1. Respondents Glass Fabricators, Inc. (Respondent GFI) and Glass and Metal Solutions, Inc. (Respondent GMS) are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Painters & Allied Trades District Council 6 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times since May 1, 2011, based on Section 8(f) of the Act, the Union has been the limited 9(a) exclusive collective-bargaining representative of the following appropriate unit of Respondent GFI's employees during the term of the 2011-2016 collective-bargaining agreement and any successor agreement in effect between the Union and Respondent GFI due to its failure to provide notice of its desire to terminate the agreement:

> Glazers in Ashtabula, Cuyahoga, Lorain, Lake, Geauga, eastern part of Erie County, northeastern part of Huron, northeastern part of Medina, northern part of Summit, northern part of Portage Counties, Ohio, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

4. Respondent GFI violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested in writing on February 9, 2016, in paragraph numbers (3), (4), (6), (8), (9), (13), (16), (17), (18), (20), (21), (22), (23), (25), and (29), and by unreasonably delaying in providing the remaining numbered paragraph requests for information, which were necessary and relevant to the Union's performance of its duties as the limited collective-bargaining representative of the unit employees.

5. There is insufficient evidence to establish that Respondent GMS is a disguised continuance of Respondent GFI for purposes of evading its responsibilities under the Act, or that Respondents are alter egos and, accordingly, Respondents have not violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union, repudiating the collective-bargaining agreement between Respondent GFI and the Union, or failing to apply the provisions of that agreement to the operations of Respondent GMS. In addition, Respondent GMS had no contractual obligation to provide the Union with the information it requested, and Respondent GMS's failure to provide that information therefore did not violate Section 8(a)(5) and (1) of the Act.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondents have not otherwise violated the Act in any other manner except as specifically found herein.

REMEDY

Having found that Respondent GFI has violated the Act by failing and refusing to provide the Union, as the limited exclusive collective-bargaining representative of its unit employees[19]

[19] Because I have found that that Respondent GFI and the Union had an 8(f) collective-bargaining relationship, it is appropriate to order Respondent GFI to provide the information requested as the limited exclusive collective-bargaining representative of those unit employees. *Jon P. Westrum d/b/a Westrum Electric and JWE LLC*, 365 NLRB No. 151, slip op. 1 (2017); See *Allied Mechanical Services*, 351

with the information requested, and by delaying in providing the Union with the remaining information requested, and thereby engaging in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Glass Fabricators, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Failing and refusing to bargain collectively with the International Union of Painters & Allied Trades District Council 6 (the Union) by failing and refusing to provide it with the information requested on February 9, 2016, and by unreasonably delaying in providing the Union with information requested, which was relevant and necessary to the Union's performance to its duties as the limited collective-bargaining representative of Respondent GFI's employees in the appropriate bargaining unit.

   (b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Furnish the Union, in a timely manner, with the information requested on February 9, 2016, in paragraph numbers (3), (4), (6), (8), (9), (13), (16), (17), (18), (20), (21), (22), (23), (25), and (29), which was necessary and relevant to the Union's performance of its duties as the limited exclusive collective-bargaining representative of the unit employees.

   (b) Within 14 days after service by the Region, post at its Lakewood, Ohio, facility, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent Glass Fabricators, Inc.'s authorized representative, shall be posted by Respondent

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NLRB 79, 83 & fn. 18 (2007) (citing *Willis Roof Consulting, Inc.*, 349 NLRB No. 24, 2007 WL 324556, at *3–4 (Jan. 31 2007) (not reported in Board volumes)).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

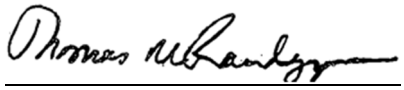
[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

GFI and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent GFI customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent GFI to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent GFI has gone out of business or closed the facility involved in these proceedings, Respondent GFI shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent GFI at any time since February 9, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent GFI has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 19, 2018



Thomas M. Randazzo
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the International Union of Painters & Allied Trades District Council 6 (the Union) by failing and refusing to provide it with the information requested on February 9, 2016, and by unreasonably delaying in providing it with information it requested, which is relevant and necessary to the Union's performance to its duties as the limited exclusive collective-bargaining representative of Respondent Glass Fabricators, Inc.'s employees in the following appropriate unit:

Glazers in Ashtabula, Cuyahoga, Lorain, Lake, Geauga, eastern part of Erie County, northeastern part of Huron, northeastern part of Medina, northern part of Summit, northern part of Portage Counties, Ohio.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union, in a timely manner, with the information requested on February 9, 2016, in paragraph numbers (3), (4), (6), (8), (9), (13), (16), (17), (18), (20), (21), (22), (23), (25), and (29) of the written request, which is necessary and relevant to the Union's performance of its duties as the limited exclusive collective-bargaining representative of the unit employees.

GLASS FABRICATORS, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Room 1695
Cleveland, OH 44199-2086
(216) 522-3715
Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/08-CA-174567 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 303-7399.